UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	
W.R. GRACE & CO.,	.	Case No. 01-01139(JKF)
et al.,	.	
	.	Sept. 29, 2008 (10:07 a.m.)
Debtors.	.	(Wilmington)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

THE CLERK: All Rise.

THE COURT: Good morning.

ALL: Good morning, Your Honor.

THE COURT: Please be seated. This is the matter of W.R. Grace, Bankruptcy No. 01-1139. The participants I have listed by phone are Jacob Cohn, Marti Murray, Scott Baena, Darrell Scott, Edward Westbrook, Andrew Craig, Shayne Spencer, Rita Tobin, Brian Mukherjee, Arlene Krieger, Peter Shawn, Chelsea Clinton, Brian Kasprzak, Toby Daluz, Richard Wyron, Gentry Klein, David Siegel, Carl Pernicone, Martin Dies, Jennifer Whitener, Craig Bruens, Alex Mueller, Jason Solganick, John D. Mattey, Leslie Davis, Steven Mandelsberg, Dan Karmensky, Briana Cioni, Robert Horkovich, Douglas Mannal, David Beane, Oliver Butt, Walter Slocombe, Douglas Cameron, Jay Sakalo, Janet Baer, Sander Esserman, Christina Kang, Warren Smith, Robert Guttmann, Michael Davis, Gerald George, John O'Connell, Christopher Greco, David Bernick, Elizabeth Devine, Catherine Chen, Matthew Kramer, Curtis Plaza, Alan Runyan, Marion Fairey, Susette Smith, Terrence Edwards, Mark Plevin, Jacqueline Dais-Visca, Debra Felder, Ari Berman, Peg Brickley, Elihu Inselbuch, Melanie Dritz, Christopher Candon, James Restivo, Anne Marie Aaronson, Daniel Glosband, Jonathan Brownstein, Daniel Speights, Barbara Harding, Theodore Freedman, William Sparks, Tiffany Cobb, Ashok Vasvani, Mark Shelnitz, and Paul Norris. If

there are any attorneys left in the United States, I'll take entries in court. Good morning.

MR. BERNICK: Good morning, Your Honor. David Bernick for Grace.

MR. LEON: Good morning, Your Honor. Eric Leon also for Grace.

THE COURT: I'm sorry, I can't hear you. I apologize.

MR. LEON: Eric Leon.

MR. BENTLEY: Phillip Bentley of Kramer Levin for the Equity Committee.

MS. BAER: Janet Baer on behalf of Grace.

MR. O'NEILL: Good morning, Your Honor. James O'Neill on behalf of Grace.

MR. COBB: Good morning, Your Honor. Richard Cobb on behalf of the Bank Lender Group.

MR. ROSENBERG: Andrew Rosenberg on behalf of the bank lenders.

THE COURT: Pardon me. Court Call, is there _- I've got music playing in the background and somebody -

COURT CALL: Right, I just located that line. Out of so many folks, it took a while to locate that line.

THE COURT: All right, thanks. It also sounds like somebody clacking kitchen pots.

COURT CALL: Oh. I don't show any other noise

except for the courtroom line at this time, but as a gentle reminder, ladies and gentlemen, for those of you who have requested a live line today, please activate your mute buttons at this time to not disrupt the courtroom, thank you.

THE COURT: Thank you. One second, counsel, please. Okay, thank you.

MR. KRUGER: Thank you, Your Honor. Lewis Kruger, Stroock, Stroock & Levin, for the Unsecured Official Creditors Committee with my colleagues, Ken Pasquale and Arlene Krieger.

THE COURT: Thank you.

MR. INSELBUCH: Good morning, Your Honor. Elihu Inselbuch for the Asbestos Creditors Committee.

MR. TACCONELLI: Good morning, Your Honor. Theodore Tacconelli for the Property Damage Committee.

MR. TURETSKY: Good morning, Your Honor. David Turetsky of Skadden Arps for Sealed Air Corporation.

MR. FRANKEL: Good morning, Your Honor. Roger Frankel for the Personal Injury Future Claims Representative.

THE COURT: Anyone else wish to enter an appearance? Okay.

MS. BAER: Good morning again, Your Honor. Janet Baer on behalf of the debtors. Your Honor, first we take up the omnibus agenda schedule. Matter number 1 on the agenda is the continuing objection with respect to the Massachusetts

Department of Revenue. That matter is tied up with an IRS matter, and once again, we would like to continue that to the next hearing which is on October 20th.

THE COURT: I'm sorry, Ms. Baer, just a second, I'm behind here. Okay, item 1 is continued, thank you.

MS. BAER: Thank you. Your Honor, item number 2 is the quarterly fee application matter. I believe a certification of counsel was filed with that.

THE COURT: I instructed staff to get those fees approved and the orders entered. I don't know whether that's happened yet. I just had an opportunity to talk to staff this morning, so it's possible that they're not on the docket yet, but the fees will be entered.

MS. BAER: Thank you, Your Honor. Agenda item number 3, Your Honor, is the motion of the debtors for approval of a settlement agreement with the Town of Acton. Certification of counsel was filed on that, Your Honor. I should say I received a communication from the Town of Acton over the weekend. They have now seen the debtors' draft plan and disclosure statement that was just recently filed. They've asked whether we could make a couple of adjustments to the order. I tried to talk to them this morning and couldn't get ahold of them. I'm not sure if the order will ultimately be amended or not, but to the extent that the Court's already entered it, what I would ask then is to be

able to submit a certification of counsel if we need to add some language.

THE COURT: I already did instruct staff - that's another one, I instructed staff to enter, I don't know whether it's hit the docket, but if you need to amend it, you can file a revised order if everybody agrees with it, but I did instruct staff to enter that order as well.

MS. BAER: I suspect that that might happen since we filed a certification of counsel, and I told counsel that, that I thought that may happen in which case if we do need to add some language, we'll go forward on the certification and do it that way.

THE COURT: All right.

MR. SMITH (TELEPHONIC): Your Honor, sorry to interrupt, but this is Warren Smith the fee auditor and if all fee matters are concluded, if I could be excused, Your Honor?

THE COURT: Yes. Anybody who's interested in any matters as to which I've instructed staff to enter orders, even though they may not yet be on the docket and that would be any matters as to which a CNO or COC has been filed, I have instructed staff to enter all of those. I was not able to do that until this morning. So, you're free to disconnect or leave as you choose. Thank you. Thank you, Mr. Smith.

MR. SMITH (TELEPHONIC): Thank you, Your Honor.

MS. BAER: Your Honor, that takes us to agenda item number 4, which is the debtors' motion to acquire a limited liability company interest in a company identified as GR 2008 LLC. A certificate of no objections was filed on that.

THE COURT: I have the same instruction to staff with respect to that.

MS. BAER: Thank you, Your Honor. That takes us to agenda item number 5, which is the debtors' 25th omnibus objection to claims. On this, Your Honor, we have an order to present to the Court with a number of exhibits. The claimants who did not respond, we are asking the Court enter relief with respect to those claimants, and the exhibits outline the various relief that is being asked for. With respect to those parties who either responded or did not respond but contacted counsel requesting additional time to address their issues, we are continuing that matter, and, Your Honor, if I may, I'd like to just read into the record the names of those parties for whom the matter's being continued until the next hearing.

THE COURT: All right.

MS. BAER: Your Honor, they are: Adis Cohen Nobel (phonetical), claim number 3344; Central Puget Sound Recreational Regional Transport Authority, claim number 9123; James and Anna Growl, claim number 9688; Harry Growl & Sons claim number 9687; the Indiana Department of Revenue, claim

15355; a second one from the Indiana Department of Revenue, claim 15369; Missouri Department of Revenue, claim 17719; Bro and Moonos (phonetical), claim number 1959; New York State Department of Tax and Finance, claim 2701; Old Castle APG, claim 12943; Old Castle AG, claim 12944; the Pennsylvania Department of Revenue, claim 318; Pennsylvania Department of Revenue, claim 407; Richard Row, claim 14037; Richard Row, claim 1641; Seaton Insurance Company, claim 15531; and June Wright, claim 603. Those matters, Your Honor, are all being continued to the October 20th hearing. In many of those instances, counsel has contacted us for additional time to respond, and we have agree with them to give them additional time to respond.

THE COURT: All right.

MS. BAER: And, Your Honor, if I could, I would then hand up an order with respect to all the exhibits.

THE COURT: I'll take it. Thank you. That order is signed.

MS. BAER: Thank you, Your Honor. Agenda item number 6, Your Honor, is the debtors' 26th omnibus objection. I believe a certificate of no objection was filed with respect to that order.

THE COURT: All right, that order will have been entered then.

MS. BAER: Thank you, Your Honor. Agenda item

number 7 is the continued status of the Scotts Company. As Your Honor will recall this is an adversary proceeding filed by the Scotts Company with respect to an issue as to whether or not they are entitled to any shared insurance due to certain asbestos claims that are being filed against Scotts. Your Honor, I spoke with Scotts' counsel, who I believe is on the phone, and we agreed that it makes sense to continue this matter to the next hearing. The debtors' plan, revised or new plan of reorganization and disclosure statement was just filed recently. I think the parties are all studying that and seeing what its implications would be on Scotts. It's clear that the Personal Injury Committee and personal injury trusts that will be established will have quite an interest in this as to the insurance, and under those circumstances, I think it makes sense to continue this matter once again for the parties to review the plan and then begin discussions about how to handle this situation.

THE COURT: Continuing it until when?

MS. BAER: The next hearing, Your Honor, October 20th.

THE COURT: All right. Anybody object to continuing this to October 20? All right, it's continued, thank you.

MS. BAER: Your Honor, agenda item number 8 is the motion of the City of Charleston, South Carolina for relief from stay. This matter's been continued from time to time,

Your Honor. The debtors and Charleston are still negotiating over the sale of this property to Charleston. There are environmental challenges that make this a slow-going process, but it is moving in a positive direction, and the parties would ask that this matter also be continued to October 20th.

THE COURT: Anybody objecting? All right, it's continued.

MS. BAER: Your Honor, matter number 9 on the agenda is a status report with respect to asbestos property damage claims, and Mr. Restivo is on the line to address this matter.

THE COURT: Mr. Restivo?

MR. RESTIVO (TELEPHONIC): Good morning, Your Honor. James Restivo for the debtors. Taking them in reverse order, item number 10, Your Honor, is our motion to approve the Jameson Hospital settlement. A CNO was filed and that order may be among the ones you talked to your staff today about.

THE COURT: That's correct.

MR. RESTIVO (TELEPHONIC): Item number 9 is a status report on asbestos property damage claims. Your Honor, on September 2, we filed a motion for approval of the Bay Shore Hospital settlement agreement, Docket No. 19428. Objections, if any, will be filed by October 3, and that will come on for resolution at the October 20 omnibus. On September 18, we filed the Children's Hospital settlement agreement. That

will come up for resolution at the November 24 omnibus hearing. Those two hospital settlements, along with the one signed today on Jameson in effect will moot out motions relating to a request to alter or amend the Court orders. Those are still technically open at Docket Nos. 15421 and 16220. As soon as the remaining two hospital settlements are approved, we'll file a consent order mooting out those motions that are still open. On September 10, we filed a motion to approve the settlement of 32 California State University claims. They will come on for resolution at the October 20 omnibus hearing. Also filed at that time approval of Pacific Freeholds, that will come on for approval at the October omnibus hearing. On September 17, we filed a motion for approval of the settlement of the 50 University of California property damages claims. They will come on for approval at the November 24 omnibus hearing. Lastly, Your Honor, with respect to this category of claims, Mr. Speights and I are in the process, getting settlement agreements signed up on the 16 remaining Speights U.S. cases that were settled, and hopefully, we'll be filing a motion to approve those remaining 16 very shortly. That leaves us, Your Honor, with the rest of the property damage claims, by our count, leaves Your Honor and the debtors with 74 unresolved property damage claims. Of those, Your Honor, 16 are claims of the California Department of General Services. Debtors believe

those are clearly barred by the statute of limitations. Those have been briefed and argued, and we ask the Court to rule on that motion. On Thursday, Your Honor, the claimant filed a certification of counsel reminding Your Honor that argument on this motion was held on April 9, 2007. I think the Department of General Services is asking the Court to rule on that motion. If they are, debtors agree with that request. There is also a suggestion in that certification of counsel that the Court ought to order the parties to conduct discovery on our no hazard defense. Obviously, the debtors disagree with that. If summary judgment is granted on the statute of limitations, we will never get to a no hazard trial, and if the Court decides there's some factual issue in dispute precluding summary judgment, the next step would be a hearing on that factual issue, and therefore, while we agree with the Department of General Services that the Court should proceed to rule on the summary judgment motion, obviously, we don't think we ought to get involved in discovery on the no hazard defense because the parties may not need to deal with that.

THE COURT: Well, Mr. Restivo, let me tell you, that one is actually my fault. I thought my law clerk had that back for final draft, and she thought that she had already given that to me for final approval, and we just this morning got resolved what the status of that opinion is, so that one

will be coming out shortly, very shortly, so, I think that we can resolve that issue in the next day or two. So, that one really will be. It's just one of those things, it was just a glitch in my office that I don't have an explanation for. It was simply a glitch in my office. It will be coming out shortly.

MR. RESTIVO (TELEPHONIC): Thank you, Your Honor. One of the other remaining 74 cases, Your Honor, is the Maeserich (phonetical) claim which was also briefed and argued at the same time, and again, I believe the parties have asked the Court to also rule on that motion for summary judgment.

THE COURT: Yes, and that one is not as - I had thought that that one was ready, but when I got a draft back - I had a student working on it, it's not ready. So, that one won't be coming out quite a quickly, but I am aware of it, and someone is working it.

MR. RESTIVO (TELEPHONIC): The two remaining United States cases, Your Honor, in the 74 cases, one is what is now the individual claim of Anderson Memorial Hospital, a class action having been denied, the other one is the Solo case, Your Honor, where we asked the Court sometime ago to lift the stay so the parties could have the appellate courts in New York resolve the appeals. We're now looking into the Solo case, giving thought as to what might be done either in Your

Honor's Court or the New York Courts to move Solo along, and we hope to file a suggestion with respect to Solo promptly. That leaves, Your Honor, 55 remaining cases that are still open and unresolved, and those are Canadian claims of Speights & Runyan. Of those 55 claims, Your Honor, 35 are from provinces which have an ultimate statute of limitations. You may recall at one point, I opined that the Canadian ultimate statute of limitations is not unlike a United States statute of repose. In any event, Your Honor, it has become apparent to Mr. Speights and to me, that we simply cannot settle the 35 remaining Canadian claims that are subject to an ultimate statute of limitations defense, and Mr. Speights and I are in agreement that the Court should proceed to rule on our motion for summary judgment with respect to the ultimate statute of limitations.

THE COURT: All right, well -

MR. RESTIVO (TELEPHONIC): I believe Ms. Baer has in the courtroom a listing of those 35 claims, and we will provide that to the Court. As the Court may recall, when we filed our original motion, we were talking about 88 Canadian claims. We're talking about the ultimate statute of limitations in some provinces and regular statutes of limitations in some provinces. Mr. Speights and I are looking for a ruling only on these 35 cases in the ultimate statute of limitations because Grace and Mr. Speights are

still in discussions on the remaining cases which are not subject to an ultimate statute of limitations defense. We have not given up hope with respect to the possibility of resolving them, and so the reason we want to give the Court a list of the 35 claims is to make sure the Court only rules on the ultimate statute of limitations because there is still some hope we may be able to move the remainder of the Canadian claims.

THE COURT: Well, I thought that -

MR. RESTIVO (TELEPHONIC): And that is where we stand then with respect to the property damage claims.

THE COURT: I thought as to those that were subject to, in the debtors' view, an ultimate statute of limitations, that Mr. Speights had requested some opportunity to do discovery or retain an expert in the event that we were actually going to go forward with the summary judgment argument on that point.

MR. RESTIVO (TELEPHONIC): Your Honor, I think the arguments in the retentions have all been done. It's my recollection, but I don't have the file in front of me, that with respect to the ultimate statute of limitations, Mr. Speights did want to do, I think, some discovery of our expert or have some information from our expert. All of that was done, and indeed, Mr. Speights filed after our argument two supplemental pleadings which are part of the record at

Docket Nos. 17059 and 17171, and so, we believe that the case is now ripe for resolution by the Court.

THE COURT: Okay, then we're going to set it up for summary argument because it's been way too long, and I don't even know that I've seen the supplemental pleadings because it's just been simply way too long. So, I want some refresher before I take a look at this and some, I guess, binder that's going to put all of the relevant pleadings together for me. I just simply don't have a - I have a recollection, but not a good enough one to take this under advisement in that format. So, maybe I'll - I don't know, Mr. Restivo, whether you and Mr. Speights want to work something out or whether you want me to have Ms. Baer contact my law clerk to set up some scheduling order and get this done? It doesn't have to be on an omnibus date if it's just going to be you and Mr. Speights doing some argument. We can specially set it for an hour or two, however long it's going to be, but I want to get it teed up in a fashion that's going to make a little bit more sense than this.

MR. RESTIVO (TELEPHONIC): I'll be happy to talk to Mr. Speights, and then we'll talk to Ms. Baer and then she can talk to your scheduling clerk. I'm hopeful of being out of the country the last week in October, and so, if you let Mr. Speights and I talk about the dates, then we'll talk to Ms. Baer and maybe we could just set an argument for about an

hour to refresh ourselves and the Court as to what the arguments are.

THE COURT: All right, that would be fine.

MS. BAER: And, Your Honor, I do have the listing of the 35 claims if you'd like me to hand it up.

THE COURT: Sure, you can give that to Ms. Baker. She'll take that.

MR. MANDELSBERG (TELEPHONIC): Your Honor, if Mr. Restivo is finished speaking, this is Steven Mandelsberg from Hahn & Hessen. As you know, we represent the State of California, Department of General Services. Just a couple of observations, Your Honor. Mr. Restivo is correct. We did file a certification the other day that sought to inquire about the status of the pending summary judgment motion of W.R. Grace against our client's 16 claims, and I gather that Your Honor's issuance of a decision this week might sort of clarify matters, and for that, we appreciate the Court's indication that a decision would be forthcoming, and we obviously believe differently than Mr. Restivo that W.R. Grace isn't clearly entitled to summary judgment as he mentions. We submitted extensive opposition papers as to other claims. I asked for a scheduling order and the factual hearing, of course, will be influenced by the Court's decision, but we don't think that there's any reason why the parties can't move on a double-track basis pending the

decision. There's only two witnesses involved on the hazard issue. Your Honor may recall that you recently granted our order to submit the expert report of Mr. Wango (phonetical) and there would be no reason why, pending your decision on the summary judgment motion, some sort of scheduling order couldn't be worked out, but we'll of course wait for that decision.

THE COURT: Yeah, I think that's an issue that can be addressed at the next omnibus if it's relevant, Mr. Mandelsberg.

MR. MANDELSBERG (TELEPHONIC): Thank you, Your Honor.

THE COURT: All right.

MS. BAER: We'll put the basic status of PD back on for the next omnibus hearing then, Your Honor.

THE COURT: If it's relevant, I think it can go back on at the next status hearing.

MS. BAER: Thanks. Your Honor, that concludes the omnibus portion of the hearing agenda today and takes us to the contested matter.

THE COURT: Mr. Bernick, give me one second and let me finish a note on - I just want to make sure that I make a note about the fact that we have the list of the 35 and that Ms. Baer's going to contact my office to arrange a schedule for the argument on the Canadian claims.

Okay, so, yes, I think just to keep status reports on the property damage issues will be helpful, so I think another status report in October would be helpful. Okay, so we're up to item 11? Mr. Bernick - Oh, sorry.

MR. BENTLEY: Your Honor, just a process clarification before we proceed - Phillip Bentley for the Equity Committee. Your Honor issued an order saying you would hear one hour from the debtor, one hour from the bank lenders. There are other parties on each side, the Equity Committee here, the Commercial Committee on the other side, that I think may need to be heard briefly. So, I just wanted to advise Your Honor of that before we get going.

THE COURT: Yes. I understood that there would be other parties who are all involved. I think the positions of the parties have sort of been consistent, I think. The issue is really a two - I'll say two-party dispute. There's one side basically on one position on the interest issue and another set of parties on the other side on the interest issue. I'm not really seeing a wide variety of disputes in the papers. To the extent that there is a dispute and you need some additional time, I'll certainly hear all of that. I think the major arguments ought to be able to be accomplished within the hour that I've allocated, but yes, I certainly appreciate the fact that you have a client to represent. I'll be happy to hear everybody's positions, but

I don't think it should take four hours to argue these matters.

MR. BENTLEY: We agree entirely.

THE COURT: All right, Mr. Bentley, thank you.

MR. BERNICK: Good morning, Your Honor. This was originally our motion, and we're prepared to go first. There's been some colloquy between the sides with respect to the status of exhibits and exhibits that apparently the bank lenders and the Unsecured Creditors Committee would offer into evidence. I think probably the best idea procedurally is to have the argument. People can make reference to whatever it is that they want, and if folks want to then offer into evidence exhibits, that's fine, but my suggestion is that we do that at the conclusion of the process rather than right now at the beginning, and that way people can go ahead and make the arguments they want and we can then have a discussion about exhibits if that's necessary.

THE COURT: Anybody object?

MR. COBB: No, Your Honor. Richard Cobb on behalf of the bank lender group.

THE COURT: Mr. Bentley, any objection?

MR. BENTLEY: No objection, Your Honor.

THE COURT: Anybody object? All right, that's the process we'll use, thank you.

MR. BERNICK: Okay. Your Honor, if I could step up

to the board here. What I would like to do is begin by laying out what I'll call a legal roadmap that I think is necessary in order to focus the issues that are essentially, at the end of the day, our point of view, factual issues and factual determinations that have to be made by the Court, but in order to perhaps speed the process of getting to that point, I want to talk first of all about the legal framework, and fundamentally, one of the major problems that we have with this case, is that there's a very different view between the two sides - Can Your Honor see this?

THE COURT: Yes, I can.

MR. BERNICK: But with respect to, in a sense, what is the governing body of law when it comes to the questions not only the substantive questions of what rate of interest should be paid to the unsecured creditors and the bank lenders, but also the process that applies in the determination of that issue, and what I've drawn here, very simply, is a simple time line, and it's not designed to be precise chronologically, but it is designed to be precise in terms of the sequence of what particular kinds of facts and what kinds of law apply, particularly given the distinction between what happens pre-bankruptcy and what happens post-bankruptcy. Pre-bankruptcy, this is a focus of a lot of what bank lenders have to say and there's no question but that the credit agreements are dispositive documents pre-bankruptcy.

The difficulty with their position is that they appear to suggest and argue, indeed strenuously so, that the entirety of the matter now before the Court can simply be resolved by taking a look at the credit agreements, and that is just not so. It ignores a fundamental fact, which is that we are in bankruptcy, and bankruptcy has an impact both on the substantive rights that are involved as well as the process that needs to be followed. In order to make it more concrete about that, clearly the credit agreements are part of the bankruptcy with payment of principal and interest. The credit agreements also set out a process whereby the terms of the credit agreements to be modified, that process requiring various kinds of written consent and authorization and indeed the law that deals with contracts, supplies an awful lot of other requirements and vehicles and rules and procedures that give bite to that process, and we've heard in their briefs it's kind of a profusion of some of these doctrines. Well, was there actual authority, was there apparent authority, is there estoppel - all of these doctrines are very interesting in a pre-bankruptcy context. The question is, what relevance do they have now that we're in bankruptcy? Bankruptcy gets filed and immediately the case now has - the bankruptcy law now affects both substantive entitlement and process. And the key provisions that we focus on is sanctioned by those two. You can't write § 502 out of the Code. You can't

decide § 502 out of the Code, and 502 has an impact on substantive rights. It says what is allowable and what is not allowable, and no amount of explanation or parsing of cases can change the plain language of § 502. It says, that with respect to principal and interest - pre-petition's interest, that is allowable. With respect to post-petition interest, no. It just says, no, pure and simple, no ifs, ands, or buts about it, it says, no. What that means is that there is no legal entitlement under the Code to post-petition pendency interest. There's just not. Now, the process also is affected. We can talk for a long time about working consents and clear authorization, et cetera, et cetera, under the credit agreements, but the fact of the matter is that credit agreements can't revise or countermand what 502 says. 502 trumps the credit agreements. So, for the bank lenders to participate directly in the process as if they're now coming in, they're all sitting down here in court everyday, negotiating and figuring out how to amend the agreement, that's just not how it works. We have a Committee appointed, the Unsecured Creditors Committee, and the Unsecured Creditors Committee is designed to represent the interests of the group as a whole including the bank lenders. The bank lenders, there's no question about it, don't in a sense directly participate until the time comes for there to be a vote and confirmation. What happens in between? Well, what

happens in between is absolutely of the essence. It is the plan development negotiation process. And why is that the job of the Unsecured Creditors Committee, which it clearly is, is that where you have not simply the preexisting contracts, but you have the overlay of bankruptcy including provisions that affect the substantive rights of the participants. It's totally appropriate that the creditors work through a Committee whose job it is to deal with the bankruptcy context, and how is it that you get to the hallmark and the ultimate goal that a bankruptcy, if you have a plan that's developed and negotiated and agreed to. You don't wait till the end and the noses are counted before you reach a vision and a way of getting to the finish line here and a resolution. This whole entire bankruptcy process depends vitally on the functions that the Unsecured Creditors Committee plays, the ability of the Unsecured Creditors Committee to take on the critical process of plan development negotiation and produce the ability to get the closure in the case. That is what the process is about. That's the process under the Code. So, we now talk about this whole stage that's being set in terms of not simply that the documentation that predated the bankruptcy but the very basic dimensions of what the bankruptcy processes are about and the very basic provisions about what substantive rights are retained and which ones are not. And so, what is the job

then of the Unsecured Creditors Committee in trying to get a plan that's developed and negotiated? Well, you have to look down the road. In the Indico (phonetical) case, actually the Fifth Circuit puts it best, it says, Once the bankruptcy is filed, equitable considerations really affect everything that happens in the case, because at the end of the day, there goes - equitable considerations play a huge role in the confirmation process. So, the job of the Unsecured Creditors Committee is not only to focus on pre-bankruptcy agreements, but to focus on equity. Equity is doing - Equity is the job of the Unsecured Creditors Committee to do equity, and what is equity, the manifestation relief, the verbalization of that requirement, we have 1124(1) which deals with impairment, and that's a necessary predicate for 1129, which we're going to get to, and as we had indicated under 1124(1) it is the Code that says that there's no post-petition interest, there's no impairment, but this deals with the impairment issue. The basic provision dealing with equity, obviously, is 1129(b). 1129(b) says, Equity that was fair and equitable is going to carry throughout the case. So the Unsecured Creditors Committee has the obligation to do equity and to obtain equity. The impact, though, of 1129(b) on 502 is an interesting and critical one. 1129(b) says, Yes, we're going to do what is fair and equitable, but the specific impact that it has on 502 with respect to pre- and post-

petition interest is to create an element of potential change to 502 and uncertainty in the following way: 502 says that principal and pre-petition interest are allowable, but whether they become allowed is subject to the requirement of fairness and equity in the absolute priority rule. So with respect to the absolute priority rule, if you have a situation where there is insolvency and there's not the ability to pay principal and interest in full, the absolute priority rule says, you may get less than full principal and pre-petition interest. Likewise, 1129(b) says with respect to post-petition interest or it's been applied with respect to post-petition interest, saying, You may actually get post-petition interest notwithstanding 502 if it is - if you have a solvent debtor and the solvent debtor is able to pay all of its claims in full. So, what that then indicates is that 502, which says no post-petition interest is subject to the overlay of the fair and equitable requirement with the possibility that there may be a plus, you may get post-petition interest, depending upon solvency. Now, this becomes then the stage that is set for the whole question of who is doing equity here in this case because this is the stage that says with respect to a case where solvency itself is an issue, there is tremendous risk and uncertainty with folks like the bank lenders. They are at risk if the solvency determination or if the estimation of personal

injury claims turns out to be a bad result, they're at risk of getting not only no interest, no pre-petition interest, they're at risk of getting less than all the principal back. They may do worse as a result of the fair and equitable requirement as set forth in the absolute priority rule, but alternatively, if the solvency analysis works out well, the estimation works out well, they may be able to do better than what 502 would ultimately enable them to get. So the stage is now set that in a case, such as the present case, where solvency is a central issue, we now know that the Unsecured Creditors Committee, trying to do equity or under the obligation to do equity, faces enormous uncertainty and risk, and that now brings us to the factual story that we believe is so critical here, because ultimately this case turns on that factual story. The time is the end of 2004 and early 2005. At that point in time, the parties in the case, under the direction of the Court, had been directed to go ahead - the debtors had been directed to file a claim. Your Honor will recall the debtor wanted to do an estimation, and Your Honor said, Look, before we do anything, we're going to get a plan filed, and then we'll think about the estimation process. So estimation is very much at the forefront as well as the requirement to file a plan. The debtor and the bodily injury claimants, the Asbestos Claimants Committee, as well as the PD Committee, are poles apart, and they're poles apart

in precisely the way that magnifies the risks and uncertainties that are created by the Code in the context of a case where solvency is an issue. The debtor obviously believes that it's solvent because it believes the asbestos liabilities are much lower than the PD indicates and UCC Committee do who believe the debtor is insolvent because the liabilities are much greater, but what this means now is that the bank lenders are sitting there saying, Well, which way is it going to turn out? Maybe we'll have pennies on the dollar. Maybe we'll be able to get some of that post-petition interest that 502 would otherwise preclude. They could have sought to go either way, and indeed there are cases where the unsecured creditors that negotiated first with the bodily injury claimants, that's what happened in Dow Corning when the banks tried to do a deal with the tort claimants. That's where they first cast their lines, and the tort claimants were prepared to pay them pretty much in full. So, if they had a choice, they could have gone to the asbestos claimants and done a deal, but history told them that that deal was not likely to pay them even the full amount of their principal and pre-petition interest, that basically in these kinds of cases, the bank lenders had been under huge pressure, indeed and as a result of that pressure, had agreed when they had to do a deal with the claimants, they agreed to numbers that were far lower than even the

amount that 502 would allow. So, they decided - the bank lenders decided to go, it chose us, it decided to do a deal with us, but what then unfolded was an arm's length negotiation. We know now from the record in this case, and I would direct Your Honor's attention to Exhibit A to our trial brief, which is a piece of correspondence from one of the bank lenders at the time. It's dated November of 2004 where that particular lender said, We should be asking for default interest. So they had lenders that were out there that were saying default interest is where we should go, but they obviously had other people in the group and they ultimately negotiated the deal, and the deal gets interesting because far from the kind of hear no evil, see no evil that they now say characterizes the relationship between the bank lenders and the Committee that is that the bank lenders were out there blind to what the Committee was doing, we now know from the briefs themselves that the rate was negotiated - and this is a quotation, if we can - We now know from the brief that was filed by the Unsecured Creditors Committee before the Court in connection with this matter, this rate was negotiated between the debtors and the Creditors Committee in consultation with certain of the largest holders at that time of the bank debt claims. Now they go on to say, Oh, well, but you didn't have them signed in ink. And of course, as they were talking about a limit, you couldn't have them sign

in ink, but the fact of the matter was that this was a deal that was not only negotiated at arm's length, it was negotiated with the direct participation, arm in arm, the significant largest holders of the bank debt stood with the Unsecured Creditors Committee behind them, knew what they were doing, and obviously were comfortable with it. The result of all that is that as the process contemplated and facing these kinds of risks, these folks decided to do a deal in the early part of 2005. Now, today, that deal is much maligned. It's kind of, Show me anything, but don't show me that deal. They say, It wasn't binding. It's like the thing never happened, that we were just talking to ourselves in the process. We were negotiating against ourselves. We agreed that if our plan went through, we would pay them principal, pre-petition interest, post-petition interest including a certain level of default but it had no binding affect on them. They can just walk away because after all they're not the Committee. That position is cynical, it's wrong, and it's inequitable under 1129(b). What specifically did they say? They say, We did not seek to have them nor did they modify their credit agreement. They say they didn't follow the process that the credit agreement required in order to do some change to the interest rate. The answer to that is pretty simple. It's the 502 - it's 502 that's the issue. It's the economy - It's 502. It's not the credit agreement

that's their problem, it's 502. What's the point of modifying the credit agreement? It's not going to change the terms of 502, and 502 is the problem, and then how would you actually modify the credit agreement? This is a case that turns on the ultimate question of what the asbestos liabilities were. No matter what they agreed in the credit agreement, the asbestos liabilities didn't turn out right, they were underwater. So what are you going to do? They have a modification that all the majority holders explicitly and with authority agreed to, that says in the credit agreement, Well, depending upon, you know, this level of solvency and this level of insolvency, this level of asbestos liabilities, whether it's this plan, the other plan, or it's three years from now, four years from now, it's trying to tie a knot on a whistle that you make. You can't possibly in the context of that kind of document, a credit agreement, give rise to an elaborate contingent plan that anticipates all the potential developments in a Chapter 11. No one would even dream of trying to deal with the myriad different developments that could take place that would cause the agreement to have to read out differently. They say, second, Hey, guys, the bank lenders remain free to vote against the plan. You didn't believe that you had a deal because otherwise you would have assured that they had to vote for the plan. And the answer is that, Well, they know that we

couldn't do that. There are very significant issues with trying to, quote, "lock up a vote". So the vote could not be locked up no matter what we did, and we knew that. So, what is it that we did, what is it that we did with this deal, and in what way is it binding? We did precisely what the bankruptcy process, about looking for fairness and equity and recognizing the uncertainty of the issue of solvency, we did exactly what the bankruptcy process contemplates. We did a deal with the Unsecured Creditors Committee on the basis of which they then agreed to support our plan. That's the most that could be done. That was the right thing to be done. That is the functionality that is sought through the operation of the Unsecured Creditors Committee, and when they did that deal - the Unsecured Creditors Committee did that deal to support the plan, they were operating with the authority of their constituency, witness this very statement in the brief. This is not a situation where they were a rogue committee. This is a situation where they were an authorized committee, an informed committee, and not only was that true on the basis of what's said in the brief, it could not but be true because we know that they had correspondence with their own people. So we had a deal, a deal that under the bankruptcy process has all the hallmarks of exactly what is respected in the bankruptcy process and expected, and in doing so, the Unsecured Creditors Committee did follow their

obligation to keep their mind and their eye focused on 1129(b), on the risks and uncertainties associated with the process, and on 502, which by no means gave them an assurance much less an entitlement to be able to get post-petition interest. Now, they've got a lot of things - a lot of legal doctrines and cases that they want so say, Oh, well, that doesn't really mean anything, and it goes on and on and on, and I'm sure that I'll hear about this, and I'll have to respond to it as I'm looking forward to in connection with the reply process, which then reminds me I've got to get done, but enough said that, first of all, most of the cases, a lot of doctrines, to get back to their brief, deal with all kinds of doctrines that pertain to contract modifications. This is not a contract modification issue. This is a plan negotiation issue. Those documents like estoppel, like, you know, apparent authority, actual authority. It reads like a nice textbook but it doesn't read out of the right text because it deals with contract instead of with bankruptcy. Then they deal with the Armstrong cases if Armstrong helps them out. Armstrong was an issue of judicial estoppel and waiver, and the Third Circuit looked it as an issue of judicial estoppel and waiver, and the question on the table was whether there was estoppel to make an objection to the plan, and the Court said that there was not estoppel to make objection to the plan. We're not arguing estoppel. We're

not arguing that they can't object. They have objected to what we're doing. The question is whether their objection is well-taken or not, and Kensington and Armstrong doesn't answer that question at all because Armstrong is a completely different case. It's ultimately a case of a clearly insolvent debtor and the question has been an absolute priority rule question, which it is not in this particular case. So, their citation to Armstrong for the proposition that we can't somehow prevent them from making their arguments, is completely inapposite. They're making their arguments, they can go ahead and make them, they're wrong, and Armstrong doesn't address the issue of whether they're right. Kensington, that was an issue that pertained to the recusal of Judge Woolen in connection with this case and other cases. The issue there was the timeliness of the recusal motion, and the Court then found, on the basis of very specific facts, that the people who made the motion for recusal did not have - it was too hard to connect the dots saying that they should have imputed knowledge with regard to what one of the law firms that represented some of them knew at a given point in time. Not only is it factually distinguishable, this is not a timeliness question. Again, they're here making the objections. This is not a question of whether it can be considered. This is a question of whether it's meritorious. But we're not done because not

only did they do a deal at the time that was every bit as hallowed and important and weighty in the context of doing equity as any deal could be, but the facts actually got even more powerful. Subsequent to that deal being done in early 2004, there are more effects. The deal was re-upped in 2006, same deal. Maybe some new lenders had come into the picture, but the idea that somehow lenders couldn't know about the old deal when it's re-upped. You now have two separate deals, included they would have to have known about it. Why? Because these deals were reflected in Grace's financial statements, and the exhibits - and this process, Your Honor, actually include - I think they even listed Grace's financial statements that were made public during this process. They clearly call out exactly how interest is being calculated, and it's not simply the default rate. It's a different rate. It's the agreed rate. So, now I'm supposed to imagine that lenders who are now trading into these debt securities are somehow still not knowledgeable to the fact that they're not getting under Grace's view of what the obligations are, that they're not getting their credit agreements? When the financial statements themselves call out in black and white that they're not getting that rate. They're getting a different rate. Throughout this whole period of time, moreover, the UCC, the Unsecured Creditors Committee never says it's backing out. No bank lender comes forward and says

that they're asking for more. Things remain status quo, and it gets better yet. On the basis of having done this deal with the Unsecured Creditors Committee, the debtor went forward and did its job. We litigated. We litigated very, very extensively, and we ultimately negotiated very extensively with the claimants, both on the PD side and also with respect to personal injury. Nobody said during that entire process, We're backing out. We're backing out. That letter is no longer good. Nobody said that the letter was terminated. Nobody said that the letter was not good and to forget about it. And so the debtor went ahead and did a term sheet, and it incorporated as one element of that term sheet as a precondition for the plan that was the subject of that term sheet, it incorporated the terms of the 2006 agreement, and we then get the statement, that's an outrageous statement in the briefs that have been filed by the bank lenders that, Oh, they kind of learned about it way after the fact, and geeze, they just never knew, and well, if they had been consulted, they certainly would have objected. Well, we know that's not true either because a term sheet was essentially given to the counsel to the Unsecured Creditors Committee, and this is one of the exhibits that we have in the case, that's the memo from Ms. Krieger to Mr. Shelnitz with a copy to Mr. Kruger, basically reiterating that they're looking at this in the same term, the same language, the same rate, and

all the rest of that, and they're not saying that they're backing off of that. They're not saying that the letter is terminated. The most that is said is that there's a proviso, Any such holder may seek to obtain a higher interest rate and shall be entitled to if the Court determines such rate is appropriate. What's so magnificent about that and so stunning is that now in the face of the actual term sheet there's no statement that the letter agreement is terminated. Not one single statement. Indeed, the Committee through its counsel is not saying that the Committee through its counsel believes that this is inequitable, believes that the letter agreement is no longer good. To the contrary, it says, Okay, now somebody may - Well, of course, somebody may seek to obtain a higher rate, and if the Court says they get a higher rate, they get it. That's always true. Anybody can ultimately at the end of the day, if they want to, vote against and object. That's a restatement of what the law says is true. What is not there, and therefore, really in critical respect, is upon the very question, is the deal with the Unsecured Creditors Committee still good? This email says it is still good. It says, We're still there. We're still not walking away. Today, as we sit here in court, the letter agreement has not been terminated, has not been terminated. Indeed today, while they asked to get a higher rate of interest, they say that the letter - they're still

not saying that the letter agreement is terminated. I don't mean to interrupt Your Honor's looking at it. This is the same -

THE COURT: Well, it says, One, for holders of pre-petition bank credit facilities, post-petition at the rate of 6.09 percent from the filing date and thereafter at the floating rate compounded quarterly in the manner provided for under the credit facility for all other unsecured claims -

MR. BERNICK: Yes.

THE COURT: - which isn't relevant now.

MR. BERNICK: Right.

THE COURT: And then, provided, however, any such holder may seek to obtain a higher rate, but that's for the all other unsecured claims. That's under the second paragraph under for all other unsecured claims not under the pre-petition bank credit facility which is fixed at 6.09 percent.

MR. BERNICK: Fair enough.

THE COURT: So, they're not asking for more than 6.09 percent.

MR. BERNICK: That's fair enough. Yeah, well, so, we have here, you know, a stunning statement that they then had the opportunity right there and then, knowing the term sheet, to say, no, wait a minute, the Committee's not onboard and the counsel are not onboard, and they never said that.

Indeed, today, they still have never said that, so they're coming before this Court with what is basically a hedge. They're saying, Oh, Your Honor, please find that we're entitled to the full contractual default rate, but by the way, there really is a floor here because we're still signing on, we've still got this letter agreement with the debtor. They shouldn't be able to do that hedge. It is not fair. It's not equitable. It's not candid with the Court. This then brings to the issue that we believe - the issues that we believe should be decided here, and I'll go through this, I think in fairly short order so that my colleagues on the other side can address these issues. First of all, there's an initial contention that our request to have this matter determined is procedurally premature because we're not in the throws of a final confirmation hearing, and we think that that argument doesn't really have any basis for it. There's nothing in the plan, there's nothing in the Code that says that somehow you can't tee up confirmation issues, that is, discrete confirmation issues after a plan has been filed, after a disclosure statement has been filed but before the final confirmation hearing. Calcine (phonetical) did not involve that circumstance. The case that is actually most instructive on this is a case called - it's a Delaware case, In Re: Stone & Webster. It's decided by Judge Walsh and the citation is 286 Bankruptcy 532, and at that time and in the

course of that case, this issue really is crossed. The Court says - this dealt with substantive consolidation, I view the Creditor Committee's consolidation motion as a request for the Court to make a determination that as an element of the plan, the substantive consolidation provision is authorized and on the facts of these Chapter 11 cases is appropriately warranted. While not a routine procedure, it is not at all unusual for a plan proponent or a plan opponent to seek a determination prior to the plan confirmation hearing as to the legitimacy of a particular provision of the proposed plan. I view the Creditor Committee's consolidation motion as such a request. And that's exactly the request that we've teed up and we've teed it up on a very timely basis. We then come to the merits and we would propose, Your Honor, that the Court address the merits by focusing on three basic questions, and the three questions are these: We ask the Court to determine first whether the Unsecured Creditors Committee's agreement is dispositive of fair and equitable no matter what the outcome of any solvency procedure would be, and this essentially is the question that's posed about whether they are held to their actions, that having basically made a bet and made a deal where the picture was uncertain and they were at risk of loss, whether they are now held to that deal as a matter of equity. That is that looking at this through the lens of what's fair and equitable, what's

fair and equitable is that the bankruptcy process as it unfolded and as it was fully complied with should be respected, and the Court specifically doesn't need to look at solvency because after the fact, a determination of solvency is exactly what they bargained away. They bargained away, under this arrangement, they bargained away that determination because they got an exchange, a floor that protected them, therefore, the very first issue is whether as a matter of equity, fairness and equity, whether this deal should be respected. A deal that still remains in place in this Court. The second issue says, If the agreement is not dispositive because it is not binding, which is really their nomenclature, and we would suggest, it's not the appropriate test but is a question of whether it is equitably dispositive but let's assume that Your Honor says, Gee, you know, because it's not binding, I want to take a look at the other fair and equitable factors that should be controlling on this issue. Your Honor says, Fine, let's go ahead and do that but then fair is fair and equitable is equitable. That is a question where the result could either be above what our agreement is, that is that they get more default interest, or below what that agreement is, that is that if they want to say this agreement is not binding, well, it's not binding. Then we'll go and do the fair and equitable analysis, but then their fortunes rest or fall on the analysis, and they have no

guarantee of any kind of floor. Now, again, we would say that that's not really fair and equitable because what that does is basically they move in to replace their bet. The fact that they made four - So, they now have relief because they're making an objection, but that's the second issue. And the third issue is, they have now basically said, Oh, well, you can't really do anything to us. We got a letter that says that we got a floor, that at the worst that we don't win now because solvency hasn't been demonstrated, so then our third alternative, say they, is to have this case held hostage including the plan. They want the plan presumably to stay in place. The plan that we filed based upon the agreement that we reached with the proponents. They want to say, Well, let's just put that on hold, then at our convenience now go ahead and litigate the estimation process so that we can show solvency. And the question that supposes is, Well holding the case hostage, even if they could do it, changed the analysis. Will it change the analysis? Now the first and the third issues are fairly straightforward. We believe that the whole - every fiber of the bankruptcy process says, A deal's a deal. You do a deal with the Committee, they stand by that deal, and that should be where the case goes unless they exercise their rights and they terminate the deal, and if they exercise their rights and terminate the deal then all bets are off. But here they did

a deal, they never terminated it, and therefore, we believe that it's a matter of the facts of this case that that agreement should be dispositive. It should be respected no matter what the outcome of an ultimate solvency determination might be because that was the very purpose of the deal was to basically say, We're going to give up our rights to go ahead and do a long-term solvency analysis, but we're also going to get some protection in that process. The third also is a fairly easy question that is, we're holding the case hostage to change the analysis, because, first of all, it's not at all clear that they can even do that. I mean, we're now going to have an estimation proceeding. After all of this time has passed and they're going to spend now another 12 - 18 months developing an estimation proceeding and try to unwind all that while keeping the deal in place. I'm not aware of anything that says that deal has to stay in place if the estimation proceeding then is resumed over the long term, but whether or not it's feasible there's no question but that under those circumstances they are putting their interests over the interests of all of the players in the case on the basis of what is essentially a speculative outcome, and under those circumstances, we believe that Quorum Healthcare is absolutely right on point. They are doing something that has no semblance of fairness and equity. They're basically using a threat of holding up this proceeding and jeopardizing the

ultimate outcome of the case in order to bet on a litigation outcome that they basically decided not to bet on when they made the deal with us. So, if they want to go ahead and do it and Your Honor goes ahead and does it, the fact of the matter is, it shouldn't change the equitable analysis, and we believe that that's the answer to point three. With respect to the second question, which is what happens if you take a step back, what happens if you take a step back and only add that how you reconcile that position, that is that they're going to hold every up as the only way to go, with the brief that was filed by the Creditors Committee in this case, that isn't possible. The Creditors Committee in response to our objection, said this about timing: The latter - which is the determination of post-petition interest - The latter issue is one more - with respect to trade debt - is an issue for another day, but as explained in more detail below, it's important for the Court to recognize now even before a plan of reorganization is filed that the proposed asbestos settlement does not treat the commercial creditors in a manner required by the law. The Unsecured Creditors Committee in this case in response to our objection said, This issue is a today issue. This issue must be a resolved issue. They didn't say, Oh, well, geeze, you know, we need to have a full-fledged estimation to reserve our due process rights. They say, We should determine this issue now. Why?

Because they recognized as they did when they did the deal, when the Unsecured Creditors Committee did the deal in this case, they were trying to look out for what's fair and equitable. Even here they're saying, Well, we have to recognize that a part of this process is getting the plan done, and because we need to get the plan done, we can't hold that off forever. We need to get a plan done, and therefore, we need to get the Court's advice with respect to this issue. So with that I come to the second category, Your Honor, which is, Well, if we're not going to look at the agreement as being dispositive and we're going to revisit all of the different equitable factors - How do those factors cut? What's the right price? Either below the agreed rate or above the agreed rate. You essentially then get into, I think what are five basic points. Number one, there has been no demonstration of solvency by the unsecured creditors or bank lenders in this case, and because there has been no demonstration of solvency and it's their burden to demonstrate solvency in order to prove that they're entitled to have that amount, to get default interest under 1129(b), because they have not demonstrated solvency 502 still controls. So, why haven't they demonstrated solvency? Their whole argument is based upon market cap as a measure of what value is. That's the only evidence that's now in the record is market cap, but there's no case that says that market cap

is a measure of liabilities, and what we're talking about here is not what Grace's worth is as a company. What we're talking about is the uncertainty over liabilities. And the cases that rely upon market cap that they've cited, cases like Uranium (phonetical), as an example, those are cases where the market cap that was being examined was of an entity prior to its being in bankruptcy. Market cap is not a prediction and market price is not a prediction of the outcome of a bankruptcy estimation process with respect to asbestos liabilities. Cases don't sell whole. So is there any record - There's no law that says you've got to do that. Indeed, the law would suggest exactly the opposite, but what about in the record of this case? Well, in the record of this case Ms. Zilly has an affidavit that they didn't bother to take her deposition. We offered her for deposition, they didn't take it. And she said, Take a look at the cases, cases like Owens Corning, as a good example, market price is not necessarily a predictor of anything, and that's because there are many, many other factors that affect price other than what the actual ongoing value of the company is where the company's in Chapter 11. Was there any rebuttal, any expert rebuttal or factual rebuttal to Ms. Zilly? No. They produced an expert, Mr. Ordway. Mr. Ordway had no solvency opinion, and indeed, his own report basically says that a lot of different things affect market price. So, as we sit here

today, there's no demonstration of solvency. We don't know what the outcome is of a whole variety of different factors, including the asbestos liability because right now what we have is a plan, a condition, and that condition includes the agreement with respect to post-judgment interest. What about contribution to the case? They have struggled. They know that as a critical factor had they contributed in a positive fashion to this case and therefore they had an expert, Mr. Ordway, and Mr. Ordway came and we've given and we will give Your Honor excerpts from his deposition. It was kind of a stunning thing, because Mr. Ordway basically had a lot of things told to him about what he should do in his analysis. I want you to take a look at the contribution. I want you to take a look at this. I want you to take a look at that, and he couldn't make them stick. All he came up with by way of saying, There's a contribution that's been made by these folks in this case is that they (a) supported the plan or they supported the debtor in connection with efforts to acquire a business or other matters that dealt with the ordinary course of its business, and that was all that he could point to by way of support. Well, the difficulty was that there was no basis for not supporting those things, and ultimately in his deposition he admitted in black and white that when he talks about support, it was the failure to make objections that wouldn't have been good objections to begin

with. That's their notion of support is that they didn't make non-meritorious objections. And the second thing that he says is that, Well, the company was able to use our cash. Well, that's a very loose term. There's the use of principal. There's the use of pre-petition interest and then there's the use of interest on interest. We're talking here about compensation or an award of post-judgment interest as interest on interest, that is, interest on interest as it would otherwise mature, although we don't say that it does mature after the filing of the -

THE COURT: Wait. I lost that, I'm sorry.

MR. BERNICK: Default interest - the default interest -

THE COURT: But the proposition is that the debtor had a loan and made use of the funds.

MR. BERNICK: It had a loan to make use of the funds.

THE COURT: The funds -

MR. BERNICK: That's correct.

THE COURT: Right. Okay?

MR. BERNICK: That's not really the issue that divides us on default interest.

THE COURT: No, I know that, but you're saying Mr. Ordway's saying that their contribution is that they made the debtor a loan, and the debtor made use of the funds.

MR. BERNICK: But they're being compensated for that.

THE COURT: Exactly.

MR. BERNICK: Yeah, so, in other words, the principal and pre-petition interest -

THE COURT: Yes.

MR. BERNICK: - is not - it's not interest on that that's at issue.

THE COURT: Right.

MR. BERNICK: It's interest on interest.

THE COURT: Well, I understand - I understand the theory. I was not - I missed what you were saying as to why that was Mr. Ordway's theory.

MR. BERNICK: Mr. Ordway didn't make a distinction. That's his basic problem.

THE COURT: Okay, all right.

MR. BERNICK: He said, Oh, we had use of the money, but he never analyzed the question of whether we actually used the interest on interest.

THE COURT: Okay.

MR. BERNICK: Or that we actually used the un-matured interest and therefore should pay interest on interest.

THE COURT: All right.

MR. BERNICK: And so, and that again, it's black and

white in his deposition. That didn't pan out either. So the whole idea of they made a contribution was completely factually undercut by Mr. Ordway. The fact of the matter is, they made no contribution that is germane to the issue here which is interest on interest. The third question is, well, somehow are they entitled to get this? Is it equitable? Because this is *de minimis*, and that $100 million among friends, big deal. And so they had Mr. Ordway again go like this, and Mr. Ordway says, Oh, well, it's not that big in the scheme of things. Look how much money equity made in this process, and he has basically an analysis that again we've got Daubert questions. We don't believe the deposition. The report should come in and we'll deal with that issue later on, but the fact of the matter is that Mr. Ordway also walked away from that. He wasn't aware of any standard or methodology that would call for that comparison between equity returns and debt returns. It was something that was given to him by the lawyers to do this whole *de minimis* argument. There's not even nomenclature that fits within the parlance of financial analysts. It's all legally driven, and he recognized that the enemy admit it, and if the comparison is apples and apples, that is, how did the - what would be the impact on the debt securities? Is it *de minimis*? And the answer's, No, $100 million of additional interest is not *de minimis* at all in debt security terms. Nor could he even

say that it was immaterial, and that's another thing that he said, Oh, well, it's immaterial. Well, geeze, is $100 million immaterial to anybody in this case, including the shareholders, people who bought into the Grace doctrine in the course of the case couldn't say that. So the whole idea of their case about whether they made a contribution, their case about whether there's *de minimis,* immaterial, all went totally down the tubes as a matter of fact through a simple cross-examination questions from Mr. Ordway. And finally we come to two of the last points that we just can't ignore. Even if the letter is not dispositive on its face, dispositive under these circumstances on the issue of fairness and equity, the letter still comes back, the agreement still comes back as being the best and most probative evidence of what is fair and equitable because it's a marketplace event. It was negotiated at arm's length. It is the best indication of how those pluses and minuses of uncertainty with respect to the ultimate ability to recover post-petition interest shake out in this case. And then finally, is the impact on this case. Basically what the unsecured creditors and bank lenders are saying in this case is, Let's go roll the dice. We don't really believe that anybody's going to walk away from this deal. Earlier they said, they'd be out of this. Oh, maybe this is an evidentiary red matter. Mr. Rosenberg, I believe, said,

maybe this is an evidentiary matter. Maybe we'll be able to show that when Mr. Bernick says that this really will jeopardize the case, that's not really true factually. Never happened. There's not a single piece of inquiry, there's not a single fact that is adduced on the basis of which they can now say, Oh, well, they don't really mean it. Let's just take another 12 months, go plotting through this. It's not that big a deal. They'll make do. There's no evidence of that. So, what they're doing basically is to say, Well, we did our deal back then. Don't pay attention to it. This is a different day. Oh, by the way, we're still not willing to leave it, really, up to Your Honor about whether that deal should - up to Your Honor about what the right rate should be, and even if Your Honor were to decide it, that's probably the right rate, that's okay. We'll bet again from the Court. We'll wait for another 12 months and see if everybody sits there and hangs on by their shoestrings while we go through a full estimation process. For all those reasons, Your Honor, we would ask the Court to rule today on the three issues that we put out on the board.

THE COURT: All right, you've ten minutes for rebuttal, Mr. Bernick.

MR. BERNICK: Thank you.

THE COURT: Mr. Bentley?

MR. BENTLEY: Good morning, Your Honor. Phillip

Bentley for the Equity Committee. Your Honor, there is no disagreement to return to your comment at the outset between us and the debtors. We agree wholeheartedly with all of the arguments that Mr. Bernick just made quite eloquently, and I don't intend to repeat any of them. What I'd like to do is add three points, and I think I can do it quite briefly. Three points that are of particular importance to the Equity Committee and our perspective here is not identical to the debtors. The three points relate to, one, fairness. The equitable considerations that Your Honor will balance if Your Honor concludes that certainly the arguments that Mr. Bernick made are not dispositive, that is, we agree with Mr. Bernick that the first point here is that there's an agreement that was reached between the debtors and the Creditors Committee and that that agreement is binding and that that should end the story or largely end the story. We agree with that. We also agree with Mr. Bernick's point that in that solvency has not been established and absent solvency being established, you don't get to an entitlement to post-petition interest. We agree with both those points but the point I'm going to add is a point that's germane in the event Your Honor believes that those two arguments don't end the discussion. In the event Your Honor gets past those arguments and concludes - and applies the reasoning that the courts have applied in a solvent context -

THE COURT: But this isn't an issue of no post-petition interest. The debtor and the plan provide for post-petition interest. This is only, as I understand it, the difference between what the plan already provides, which is higher than the interest that would have been attributed under the contract right, but not as high as the default rate.

MR. BENTLEY: No, that's absolutely right, Your Honor.

THE COURT: Okay.

MR. BENTLEY: And that it's really a matter of consent. The consent of the debtors, the consent of the Equity Committee to pay them that amount of interest even though they might not be entitled to any were Your Honor to determine the legal issues without considering our consent.

THE COURT: All right.

MR. BENTLEY: Let me turn to the additional fairness point that from the standpoint of our Committee is extremely important, and that is, Mr. Bernick has focused principally on the agreement with the Creditors Committee. There's, of course, another agreement that's critical here, and that's central to why we're all here today arguing about post-petition interest, and that's the agreement that was reached back in April among the debtors, the Equity Committee, and the representatives of the personal injury claimants. Now,

that settlement, the lenders are one of the principal beneficiaries of that settlement because as Mr. Bernick has mentioned, absent that settlement there would be genuine uncertainty as to the debtors' ultimate aggregate liability to the asbestos claimants, and there would also be an argument that the asbestos claimants have pressed throughout this case as to whether this Court would have the power to cap the aggregate claims of the asbestos claimants. The settlement that was reached in April, eliminates those uncertainties, and there's great benefit, of course, to all parties, including the lenders because it eliminates a huge hurdle to proving insolvency and having them be paid in full plus post-petition interest. The equitable point, Your Honor, that's germane today is this: In order to get that settlement, the debtors made substantial concessions to equity, made very substantial concessions. Essentially, we're getting substantially less under that settlement than we would if we litigated all the way with the asbestos claimants and won. As in the nature of any settlement, we're accepting a substantial reduction from the recovery we'd get in that circumstance.

THE COURT: Well, that's assuming that the debtor's solvent. If the debtor isn't solvent, you're getting substantially less, but then so would the banks.

MR. BENTLEY: True, Your Honor, but my point is

this, Your Honor -

THE COURT: So, the banks ought to be aligned with equity in that position. I mean, the lay of the land here is really very strange, but -

MR. BENTLEY: Well, the point, Your Honor, is we made a substantial concession to eliminate that uncertainty. The essence of the lender's position is they should be able to reap the benefit of eliminating the uncertainty of the magnitude of the asbestos claimants but they should not give up anything. They should recover exactly what they would recover in the event we litigated to the end of the road with the asbestos claimants and won. In other words, they should get a hundred percent of the post-petition interest measured under the highest possible measure, and we think, Your Honor, that's the opposite of equity. They would like to reap the benefits of the asbestos settlement without bearing any of the costs. So that's point one, Your Honor. The second point relates to practical consequences of the lender's position in the event it were to be adopted by Your Honor. And as Your Honor is undoubtedly aware, the deal that was reached in April was a very difficult deal to negotiate. It was a very big accomplishment, and the equity gave up as much as it was prepared to give. It was right at the upper bounds of what they were prepared to give to the claimants. One of the central elements of that deal, Your Honor, was that this

agreed amount of post-petition interest would be paid to the lenders, nothing more. We are obviously prepared to stick by that deal. We're prepared to pay that amount of interest. We're not prepared to pay more, and if Your Honor were to rule that they're entitled to a greater rate of default interest, that condition of the deal would not be satisfied, we would not have a deal. Now, does that mean we couldn't go back and renegotiate it? It certainly may, Your Honor. Our goal is to get this case resolved consensually, but the last thing we want, Your Honor, is to have to go back and reopen that deal and renegotiate the deal, and that's the position that we and everyone in this courtroom would be forced into in the event the agreed amount -

THE COURT: The Court's not going to be held hostage to a legal determination by virtue of the fact that it's either going to cause more negotiation or not, Mr. Bentley, I'm sorry, but that's inappropriate. If I come to the legal determination that the bank's entitled to it, then the consequences are going to be whatever they are. I think it would be highly unfortunate, but nonetheless, if that's what's required, that will be required.

MR. BENTLEY: We understand that, Your Honor. We understand Your Honor's going to do what's legally appropriate, what's legally required. That was a key part of this deal though because we, like the debtors, understood

that there was a deal with the Creditors Committee on which we could rely and on which we did rely, and we would hate to see that achievement upset. One final point, Your Honor, and this is a legal point. The central case on which the lenders rely is the Sixth Circuit Dow Corning decision. That's the case on which they rely for the proposition that in balancing the equities, Your Honor should put a heavy thumb on the scales in favor of the contractual default amount, and my point, Your Honor, is simply that the facts of Dow Corning were fundamentally unlike the facts of this case, and therefore, the Dow Corning holding on which they rely really does not apply here for one simple reason. In Dow Corning, Your Honor, the debtors and the breast implant claimants reached a settlement that was not contingent on any specified resolution of the post-petition interest issue. The settlement left that issue to be resolved through post-confirmation litigation. The debtors and the breast implant claimants went ahead, confirmed the plan, were prepared to consummate the plan. So the Court in Dow Corning was not faced with this additional element that the whole successful resolution of the bankruptcy hinged on a particular resolution of the post-petition interest issue.

THE COURT: Do you know whether in Dow Corning there was a financial default pre-petition?

MR. BERNICK: There was no financial default pre-

petition in the Dow Corning case.

THE COURT: All right.

MR. BENTLEY: So, my point to wrap up on Dow Corning, Your Honor, is simply had the facts in that case been the same as they are in this case in that key respect, we don't know what the holding of the Sixth Circuit would have been, and we think it may well have been quite different.

THE COURT: All right, thank you.

MR. BENTLEY: Thank you, Your Honor.

MR. ROSENBERG: Good morning, Your Honor.

THE COURT: Good morning.

MR. ROSENBERG: Andrew Rosenberg, Paul, Weiss, Rifkind, Wharton & Garrison for the bank lenders. I feel - I have no demonstratives and nothing to put up on the board. I feel a little bit like a - I guess a kid who shows up for show-and-tell without a toy, so it's just going to be me and nothing else to look at. As Your Honor knows, we've fully briefed these issues, and what I'm going to do is try to just hit the high points here. It is the most basic proposition of corporate law that creditors must be paid all amounts owed to them under their contracts before equity can retain value.

THE COURT: Why are the banks entitled to a default rate of interest.

MR. ROSENBERG: As a matter of statute?

THE COURT: As a matter of anything. Why are the banks in this case entitled to a default rate of interest? What is the pre-petition default that lets the banks claim a default rate of interest in this case?

MR. ROSENBERG: Your Honor, I don't believe the law is such that there needs to be a pre-petition default. I believe we cited that Chicago case in our brief.

THE COURT: But I'm not in Chicago.

MR. ROSENBERG: Correct, Your Honor.

THE COURT: Okay.

MR. ROSENBERG: We're not in the Seventh Circuit.

THE COURT: And I don't, as a matter of corporate law, there was no default pre-petition.

MR. ROSENBERG: Correct.

THE COURT: You're relying largely on the corporate documents. So, we agree that there's no pre-petition default that would have led to a default rate of interest. So, why, post-petition, because as I understand it, the debtors aren't in any financial default post-petition either, and the debtors have made all the payments when due. The only issue appears to be the fact that the debtors filed bankruptcy. That's clearly not an event of default that's going to get you a default rate of interest. The debtors are already proposing to pay interest at higher than the contract rate. So, what as a matter of corporate law in the facts of this

case entitles the banks to a default rate of interest, as a matter of corporate law?

MR. ROSENBERG: Two things, Your Honor. First, the debtors had their numerous defaults post-bankruptcy. There were financial covenants that had been breached. There are interest payments that have not been made, so whether - the debtors may not have been in default.

THE COURT: Interest payments?

MR. ROSENBERG: Correct.

THE COURT: Okay, such as?

MR. ROSENBERG: The debtors were supposed to pay interest on a quarterly basis according to the contracts. They did not. The debtors breached various financial covenants, reporting requirements post-petition. I don't there's any dispute that there are numerous post-petition defaults in accordance with the documents. So, putting aside whether the bankruptcy itself can be an event of default triggering other fee requirement to pay post-petition interest, there have been - I would have to guess, dozens of defaults, and Mr. Freedgood's affidavit, I believe, is evidence of the numerous defaults that occurred post-petition. Second, as a matter of -

THE COURT: Covenant defaults and you're saying post-petition interest rate defaults.

MR. ROSENBERG: Covenant and payment defaults,

correct.

THE COURT: Okay.

MR. ROSENBERG: Virtually, I think every default that there could be in there has occurred at this point.

THE COURT: And the interest rate defaults are based on -

MR. ROSENBERG: The failure to pay the interest when due on a quarterly basis.

THE COURT: Okay. From what theory? How were the - I'm sorry, what was the security that generated a post-petition payment obligation on behalf of the debtors?

MR. ROSENBERG: The credit agreement itself provides that interest is supposed to be paid on a quarterly basis. It obviously doesn't say post-bankruptcy. It says it's supposed to be paid. When it's not paid, that's a default that occurred post-bankruptcy. Financial reports are supposed to be provided post-bankrupt under the contract. They were not provided. That's a default. Bankruptcy doesn't relieve the debtor of all consequences of a default. It simply relieves the debtor to the automatic stay of the enforcement of the default, and I don't believe there's been any case cited for ending up in an *ipso facto* clause taking away a right from the debtor that says, Debtors are relieved of all consequences of their default, and I believe that we have cited several cases in our brief to the contrary.

THE COURT: Okay, go ahead.

MR. ROSENBERG: Thank you, Your Honor. What Grace's equity wants to do here is the polar opposite of the basic proposition of corporate law that I just addressed. They essentially want to keep the equity in their house without having to pay off the mortgage in full in accordance with the terms. This case is really that simple. Grace has made an eloquent 50-minute presentation in an effort to dance around this basic truism. I suspect we'll hear 10 more minutes in rebuttal.

THE COURT: But you don't have a secured claim.

MR. ROSENBERG: Correct.

THE COURT: Okay. So, that's the whole problem. Why does the debtor have to pay interest on an unsecured claim?

MR. ROSENBERG: The debtor has to pay -

THE COURT: I mean, this is a bankruptcy. Section 502 talks about when the debtor has an obligation to pay interest.

MR. ROSENBERG: Correct.

THE COURT: You don't have a mortgage. You don't have a security interest. You don't have an entitlement to interest, period, end of story from what I can tell.

MR. ROSENBERG: I think the debtor has made out a - there's a fundament confusion between § 502 and the legal

entitlement to post-petition interest. Section 502, Your Honor, says that a claim that essentially under 502(a) when you file a proof of claim it's deemed allowed. No disagreement there and including any claims in there. Section 502(b) -

THE COURT: It says it's *prima facie* evidence of the allowance, I believe.

MR. ROSENBERG: Correct, no dispute, Your Honor, under § 502(b) that a claim for a un-matured interest can be disallowed. No dispute there. However, the entitlement to post-petition interest is in addition to the allowed claim. Even the debtors - and I'm going to through this, even the debtors' plan which was filed last week talks about interest on the allowed claim, not as part of the allowed claim, interest on the allowed claim. And if we turn, for instance, to section - the distinction is, among other places, § 726 of the Code shows this.

THE COURT: But we're not in § 726.

MR. ROSENBERG: Correct. I'm trying to demonstrate for the Court, however, the distinction between an allowed claim and interest on an allowed claim -

THE COURT: Well, I understand the distinction, but we're not in Title - in a Chapter 7, nor are we talking about the priority scheme of distribution that a Chapter 7 Trustee would make.

MR. ROSENBERG: Right.

THE COURT: We're in a Chapter 11 plan whereby people can negotiate for different treatment, unless you're telling me that you want to go back to an absolute priority distribution.

MR. ROSENBERG: What I'm saying - Well, under § 1129 -

THE COURT: Yes.

MR. ROSENBERG: And I want to turn to section -

THE COURT: Well, I want to go back to the interest issue first because you told me that the debtors were in default because they hadn't paid the quarterly interest.

MR. ROSENBERG: Correct.

THE COURT: But it's an unsecured claim.

MR. ROSENBERG: Correct.

THE COURT: And so un-matured interest allowed. So the debtors don't have to make those payments, so they're not in default. So, you're not entitled to a post-petition default rate of interest. So we go back to the fundamental question that I asked. Where are you entitled as a matter of corporate law to the default rate of interest?

MR. ROSENBERG: There's a contract, Your Honor.

THE COURT: Yes.

MR. ROSENBERG: And we're going to get to the legal entitlement - I think this is all under 1129, which is the

legal entitlement to be paid interest due under your contract before equity retains any value. That's where this comes from, Your Honor. It's not a 502 issue. It's an 1129 issue.

THE COURT: Well, I guess this is the cart before the horse. I think the two of you are trying to determine which applies first, 1129 or 502, and that may be the question.

MR. ROSENBERG: Well, I think that is actually critical and essential, and perhaps, I think, Your Honor, the confusion over this will fall away a little bit if I get into the procedural context we're in and we cut the issue of impairment, because I think the PPIE case, New Value, all recognize the distinction between the legal entitlement to post-petition interest and allowance of claims, and I think that actually causes the odd procedural setting of this and also I think will make this distinction clear, and it probably will makes sense, Your Honor, I will turn to those and skip the rest of my introduction.

THE COURT: Well, actually, I think I'm just going to let you recite your argument the way you want to because what I was not picking up in the brief is the question that I've asked, and I'm still not picking it up from your answer, and so I think if you just say your argument the way you wish to state it, maybe I'll pick it up from that. So, I'll just go back, try to keep my mouth shut, and -

MR. ROSENBERG: Your Honor, it's your Court, if you have questions, I encourage you to ask them.

THE COURT: Well, that was my question. So, I've asked it, and I'll try and pick it up from the argument. So, go ahead.

MR. ROSENBERG: Okay. If I have not convinced Your Honor at the end of the argument as to be the legal - or have a basis for the legal entitlement to what post-petition interest is, please ask again, because I don't want to leave the podium without convincing you of that basic point.

THE COURT: All right.

MR. ROSENBERG: And I'm sure Mr. Bernick would not like that either, because it would give him nothing to rebut in his final 10 minutes.

THE COURT: All right, Mr. Rosenberg, go ahead.

MR. ROSENBERG: Okay. Let's begin at the beginning with the procedural context of this hearing, which I think it goes right to the point about 502 and its interrelationship with 1129, fortunately, it's about the next 6 or 7 minutes of my presentation.

THE COURT: All right.

MR. ROSENBERG: This is a claims objection. The proofs of claim filed by the bank agent indeed sought post-petition interest. The five exclusive claims were upon filing deemed *prima facie* evidence of an allowed claim as of

the petition date. Hence, prior to the objection under § 502(b), the claims for post-petition interest were deemed allowed. The debtors have now objected to the proofs of claim. They're pleading is styled, Objection to Unsecured Claims. The relief they seek is disallowance of the proofs of claim to the extent that they seek allowance of post-petition interest at the default rate, and the debtors, quite frankly, could have made its objection at any time after the proof of claim was filed four years ago and without reference to any Chapter 11 plan whatsoever. The only valid basis for disallowing an allowed pre-petition claim under § 502(a) are the grounds set forth in § 502(b). I don't think there's any disagreement yet on anything. And the objection would be procedurally proper if the debtors had only made an objection on the basis that the bank lenders' claims are for un-matured interest under § 502(b) as of the petition date. Instead, Grace goes far beyond § 502(b) and makes numerous other objections under § 1129 and § 1124 that have everything to do with plan confirmation and nothing to do with § 502(a) and (b) claims allowance. Specifically, the debtors seek to disallow the bank lenders' claims to the extent that the bank lenders will seek post-petition interest in connection with the Chapter 11 plan under § 1129(a)(7), 726(a)(5), and 1129(b), and as now set forth in their trial brief and in the plan that was just filed, Grace now apparently also seeks a

ruling that the bank lenders will be unimpaired under § 1124 as well. This additional relief is not permissible in the context of a claims objection. While post-petition interest is allowable under § 502(8)(a), absent objection and disallowance under 502(b), it is separately payable under 1129(a)(7), 726(a)(5), and 1129(b) on an allowed pre-petition claim. That's how they're in their plan, as I mentioned, Your Honor, as the allowed claim and interest on the allowed claim.

THE COURT: Well, they could volunteer to pay interest on an allowed claim.

MR. ROSENBERG: Correct.

THE COURT: Okay.

MR. ROSENBERG: Your Honor, I will get to the requirement to pay this and where it comes from. Disallowance of post-petition interest as part of an allowed claim under § 502(b) is merely the beginning of the inquiry on post-petition interest, not the end. Post-petition interest under 726(a)(5) and 1129(b) represents an entitlement to interest on allowed pre-petition claims, not necessarily part of the allowed claim itself. It's this entitlement that presents a problem for the debtor. It's this entitlement that creates that board, because what the debtor is really asking for here is something that is not available in the claims objection process. It will defeat

the bank lenders' entitlement to post-petition interest on their allowed pre-petition claims in the context of the plan the debtors have filed. It's the context of the plan that the debtors filed that this right arises. It's not some in the midst type right that it rises to. That is what 502(b) deals with. Where this entitlement comes from is in connection with this plan, that's why it's embodied in 1129(b) and all the case law that I'm going to discuss, and it's not limited to 502(a) and (b). It's in the plan context.

THE COURT: So, your contention is that a creditors committee can negotiate with the lender's consent to a particular rate of interest so that the plan can get filed and then the lenders, after they've agreed to that rate of interest for purposes of the plan negotiation, can turn around and disagree with that rate of interest simply because once the plan is actually filed and then returns a distribution to equity as a part of that plan, the lenders then feel that they're entitled to more interest than the plan provides despite what they've agreed to.

MR. ROSENBERG: No, Your Honor.

THE COURT: Because clearly, they wouldn't be allowed to the - Had the debtor just filed an objection, as I understand your argument, to the un-matured portion of the interest on an unsecured claim, that amount of interest would

clearly be disallowed. So there would be no entitlement to the un-matured interest.

MR. ROSENBERG: Correct. In a vacuum having nothing to do with the plan -

THE COURT: In a vacuum.

MR. ROSENBERG: - un-matured interest is disallowable under 502(b).

THE COURT: Okay. So, we now have the principal allowed, no un-matured interest.

MR. ROSENBERG: Uh-huh.

THE COURT: Now going forward for post-petition interest, unless the debtors are solvent, I think we can all agree to, that there would be no post-petition interest on an unsecured claim, not for anybody. Not for the banks, not for the trade, not for the assets, not for anybody.

MR. ROSENBERG: Correct, and I'll get into in a few moments, Your Honor, what solvency means in this context, but agreed it must be reorganization solvent.

THE COURT: Okay. And in that context, typically, would be in some form of no distribution to equity, I think we can all agree with that too.

MR. ROSENBERG: Correct, if equity was getting no distribution, agreed.

THE COURT: No interest is being paid to anybody.

MR. ROSENBERG: Uh-huh.

THE COURT: Well, equity may not even have to get a distribution necessarily, but for purposes of this discussion, let's just assume that equity wouldn't be getting a distribution. So, no interest is being paid, equity's not getting anything. Now, the creditors decide that they really do want to reorganize, and so they get together and everyone bargains, and so, entities give up something so that equity can give something, and in the context everybody says, Fine, I'll give up A, you'll give up B, and in that context we'll pay a little bit of interest, even though we wouldn't have to to unsecured creditors, and so while we do that, we'll pay a little bit to the equity and that way everybody will be happy, and we'll get a plan together, and it will be a consensual plan, and life will go on, and everybody says, fine. So even though, as a matter of pure law, no one would be, in quotes, "entitled" to that interest rate or that distribution to equity, the parties agree to it. That's what the plan process, the negotiation process does. So, the debtor's allowed to pay claims, if it chooses to, and the debtor files a plan that says, I'm going to pay these claims. The parties all vote for it. That's the end. They've agreed to it, that's the end of the matter. Isn't that what the plan negotiation process is supposed to do to get a consensual plan together?

MR. ROSENBERG: Your Honor, two points: One, as to

the entitlement, the answer is that once a plan is filed, and let's put the so-called agreement to the side for a moment, as a legal matter, if equity is to retain value, then the creditors are entitled to be paid in full in accordance with their contracts unless there's compelling equitable circumstances to find that they shouldn't.

THE COURT: As a legal premise, correct.

MR. ROSENBERG: Once the debtor filed this plan, retaining equity, putting aside any agreement as a matter of law absent some -

THE COURT: You can't put aside the agreement, the debtor wouldn't be filing a plan.

MR. ROSENBERG: I'm going to get to the agreement in a second, Your Honor. I just want to establish because we were talking about where the entitlement came from, and I think it's important to establish that, that this is not - giving interest is not a gift back to the bank lenders. It's an entitlement they have to be paid in amounts due under their contracts before equity gets anything - basic proposition of bankruptcy law. We're entitled, if equity is getting value, to be paid in full. Now, let's get to the agreement, Your Honor.

THE COURT: As an unsecured creditor, I think we've got an issue with respect to entitlement. As an unsecured creditor, you're entitled to be paid your principal, not un-

matured interest. I'm not sure -

MR. ROSENBERG: Unless the debtor is solvent.

THE COURT: - unless the debtor is solvent, but that doesn't mean that returning something to equity in the context of a negotiated plan makes the debtor solvent. I have a fundamental disagreement with you with respect to the fact that because equity gets a distribution in a negotiated plan that that makes the debtor solvent. I cannot see how in the context of a case in which there has not been an estimation of the ZAI liabilities, the property damage liabilities, the asbestos personal injury liabilities, the Canadian liabilities, the U.S. liabilities, you can state as a matter of fact that this debtor is solvent. I have no evidence of that. I don't know that the debtor's solvent or not solvent.

MR. ROSENBERG: Well, to turn to the solvency question, one would just go right to there. I agree that solvency is a critical issue, and let's skip some of the earlier parts of this and address that, and then I want - please, Your Honor, don't let me forget to go back to the agreement.

THE COURT: All right.

MR. ROSENBERG: Okay. We're really talking at the end of the day about the fair and equitable standard; correct? Correct. One circumstance where it's deemed fair

and equitable to not pay - this is not paid post-petition interest is where a debtor is not reorganization solvent. There's no disagreement here. As set forth in page 17 through 20 in our brief, and I think we've cited a lot of law, the reason that it is fair and equitable to not pay dissenting creditors post-petition interest where all creditors are not being paid all amounts due to them, insolvency again. In other words, the solvency requirement is to protect creditors of companies that can't pay their debts in full when being harmed to the passes of time in bankruptcy by the growth in claims with higher post-petition interest rates as compared to those with lower interest rates. If the debtor's equity is retaining value under a plan, this concern is alleviated and creditors are entitled to post-petition interest because such payment will be at the expense of equity. That's all that the case law says. There's simply no general fair and equitable principle that stands for the proposition that equity should retain value before its creditors are paid in full. Now, what the - and this has caused a lot of confusion here. What the debtors are seeking to do is to look at solvency as divorced from the fair and equitable standard of 1129(b) on some type of balance sheet insolvency. This makes no sense in this circumstance. Solvency is part of the fair and equitable determination itself, Your Honor, we believe at confirmation,

is not solvency in a vacuum, but whether the fair and equitable standard has been satisfied by the debtor if it seeks to cram down the bank lenders.

THE COURT: But the debtor isn't going to try to cram you down. The debtor's already paying you interest. This is not a case where the debtor is saying, I'm not going to pay the bank's interest. The debtors' plan already proposes to pay more than the contract rate of interest.

MR. ROSENBERG: What is the debtors' plan proposed - this is odd since we don't obviously have, the debtors' plan is not before it, but what is the debtors' plan doing then if it's not cramming us down if we're voting no against the plan?

THE COURT: Well, the debtors' plan proposes to pay principal plus a rate of interest that is higher than the contract rate and less than the default rate. So the only issue is whether or not the rate ought to be something higher than the contract rate and less than the default rate. That's what we're fighting about at the moment.

MR. ROSENBERG: Correct.

THE COURT: Okay, the parties are fighting about at the moment whether the bank is entitled to a default rate of interest.

MR. ROSENBERG: Uh-huh.

THE COURT: Outside bankruptcy, just period, outside

bankruptcy, bankruptcy had never happened and the debtors were, I guess, liquidating the company. As a matter of contract law, period, just matter of contract law, that's what I went to in the first place, how would the banks be entitled to claim a default rate of interest? And you're telling me that it would be because the debtors missed quarterly interest payments. Well, as a matter of contract law, that may have been the case, but 502 stops the debtor, I believe, in this circumstance from having to pay that quarterly rate because the debtors have objected to the un-matured interest claim, and I think based on the fact that this is an unsecured claim, there is no entitlement to un-matured interest, so the debtors didn't have to make that payment, so there is no financial default. Now, I don't know about the reports issue, the reporting requirement that you're speaking about and how that impacts. I know the debtors file monthly operating reports. While that may not be sufficient and the AKs and the other financial filings, I don't know. I'll assume for purposes of this discussion just because otherwise I can't get through it, that that would take the place for bankruptcy purposes of the reporting requirements. As I said, I'm not making a finding. I'm just making an assumption, that that would take place because otherwise I can't get through the point that I want to make. So, the debtors have satisfied financial reporting

requirements that the credit agreement requires, assuming that the credit agreement still is somehow operative in that respect post-petition. So, there is no default that would entitle the lenders in a comparable circumstance outside bankruptcy to a default rate. So, I don't see where you get a default rate. I mean, I don't see the comparability pre- and post-petition under the circumstances here. The big thing is the financial issue, I think. It's not so much the reporting issue. The debtor's pretty much subject to a scrutiny in the bankruptcy context. Had the lenders, I think, deemed themselves worried about what the debtor was doing from a financial reporting circumstance, I think I would have heard from you a whole number of years ago, and I haven't. The lenders have been very silent in that respect and in addition, they've dealt with the debtor in DIP financing post-petition. So, I don't think they would have been doing that either, if they had been too uncomfortable with what the debtor was doing from a reporting circumstance. So I find it a little hard to believe that they're really relying on that premise. Now, not paying the post-petition interest if 502 wasn't out there, that might be an issue, but 502 is out there, and so the debtors don't owe post-petition interest on the un-matured portion of the interest rate. So there's no financial default. I can't see an entitlement, and that's the word I'm looking for, the entitlement to the

post-petition interest. There's no financial default. There's no entitlement to the post-petition - I'm sorry, I didn't mean that. There's no entitlement to a default rate of interest under the documents pre-petition. So you don't get a default rate of interest pre-petition, why would you be entitled to it post-petition?

MR. ROSENBERG: Is Your Honor saying that there's no right to post-petition interest at all in bankruptcy essentially giving it -

THE COURT: No.

MR. ROSENBERG: Okay.

THE COURT: No, I'm not saying that. I'm looking at this case, the facts of this case. I don't think you could make a blanket statement, Mr. Rosenberg. I would in no way be trying to generalize beyond the facts of this specific case.

MR. ROSENBERG: But, isn't Congress's repeal - I mean, I think this goes back to New Value, Your Honor, which is where Congress said, essentially, if you aren't being paid post-petition interest, and it has to be post-petition interest in accordance with the contract, it's not just any post-petition interest, you were impaired, and if you're impaired an -

THE COURT: But you're getting more than the contract rate.

MR. ROSENBERG: But I'm still impaired, Your Honor. I'm not getting what the contract rate. Your Honor, we should discuss what is the appropriate rate here.

THE COURT: Well, if you want the contract rate, that's easy. I'll sign an order that says you get the contract rate.

MR. ROSENBERG: The contract rate is the rate Your Honor set forth in the contract, which is the default rate at this point.

THE COURT: It is not. I wholly disagree. I do not see an entitlement to the default rate of interest. I don't see a legal basis on the facts of this case for the debtors to be even offering let alone this Court confirming a plan that would provide for that default rate absent the consent of the parties.

MR. ROSENBERG: And this, Your Honor, is not because - it's not, Your Honor, because you believed that we are - or the Court believes that we're not impaired. It's simply - it comes down to the legal point in Your Honor's view that the default itself as a matter of corporate law has not occurred?

THE COURT: No, I think it's that you're entitled to some post-petition interest as a matter of impairment.

MR. ROSENBERG: Okay.

THE COURT: You're entitled maybe to the contract rate, but the contract rate is not the default rate. The

default rate stands to protect creditors for particular reasons. Those particular reasons are not met in this case. Therefore, there is no entitlement in this case to the default rate of interest. Now, parties can bargain for it, and I have no problem with parties bargaining for it, but that's not what happened here. The parties bargained for a rate that was - maybe not quite midway, but somewhat midway between the contract rate and the default rate. So, that's what they bargained for, and it worked. You know, you got a plan together. That's what the parties bargained for, and people relied on it. Now, why should the rug be pulled out when there was a bargained-for agreement with the banks participation in the part of the Creditors Committee. Well, you laugh, but there are letters that say, "With the banks participation". There's a brief that asserts that. Is that false? Have I been mislead? If so, I'd like to know that because I would hold counsel accountable. So, if that's the case, I demand an affidavit, I demand it. I order it. If I've been given a false statement in a brief by counsel, I order the parties who prepared that false statement knowingly and intelligently to retract it, and I will enforce remedies against counsel who have deliberately mislead parties in this Court. I will do that.

MR. ROSENBERG: Let's, Your Honor, turn to the crux of this thing which really seems to be the Creditors

Committee's agreement.

THE COURT: And I want it within 10 days.

MR. PASQUALE: Your Honor, I - Ken Pasquale from the Unsecured Creditors Committee. I'm not certain what the Court's asking for. There's been no misrepresentation made in any pleadings we filed.

THE COURT: Well, I've got counsel sitting here laughing when I just asked that question.

MR. COBB: I was not laughing.

THE COURT: It was you.

MR. COBB: Your Honor, Richard Cobb on behalf of the bank lender group. I was not laughing. I was appreciating the Court has identified the crux of the issue, and, Your Honor, there has been no misstatement by either the bank lender group or by the Unsecured Creditors Committee in any part of our papers.

THE COURT: All right, if that's the case, then I have a brief on file that indicates that the Creditors Committee acted with the knowledge and consent of the bank lenders who were the principal lenders at the time. If that's the case, then the interest rate was negotiated with the bank lenders' participation and consent. So, if I don't have a misrepresentation of record, then everybody participated and this was a knowing involvement and agreement by everyone, why should the Court in some how or other be

involved in something that unwinds a deal.

UNIDENTIFIED SPEAKER: (Microphone not recording.)

THE COURT: I'm sorry, sir?

UNIDENTIFIED SPEAKER: There are reasons and we'll get to them.

MR. ROSENBERG: Your Honor -

THE COURT: Particularly from the Creditors Committee.

UNIDENTIFIED SPEAKER: Particularly -

MR. BERNICK: I think this is the part that you have -

THE COURT: Yes.

MR. ROSENBERG: Your Honor, sorry, I was just checking on the time that I have.

THE COURT: I have been interfering with your time. I said I would keep my mouth shut, and I didn't. So, I will give you more time, sir.

MR. ROSENBERG: Thank you, Your Honor.

THE COURT: But I'm still looking for the same answer.

MR. ROSENBERG: Yes.

THE COURT: Okay.

MR. ROSENBERG: But let me get back to it because I think this is boiling down to something relatively -

THE COURT: Solvency? You were talking about

solvency. I still don't have any indication of where the debtor is solvent on this record.

MR. ROSENBERG: I don't think Your Honor - Well, let me - I want to finish the point on the agreement since that seems to be -

THE COURT: All right.

MR. ROSENBERG: I don't think while there's a lot of legal principles going around, Your Honor doesn't seem to dispute the fact that post-petition interest should be paid, it's just a question of whether that's post-petition default interest or not.

THE COURT: Exactly. That's exactly correct.

MR. ROSENBERG: So, I think at that point, quite frankly, Your Honor, you go past the solvency point because solvency is only necessary to establish a right to post-petition interest at all. If we're past an impairment, it's the same issues. If we're past that, we're really now into the crux of the fair and equitable considerations.

THE COURT: All right then, if that's the case, I'm not sure I necessarily agree that we have to get that far, but if we're there, why is this rate of interest not fair and equitable? It's what the parties bargained for.

MR. ROSENBERG: Your Honor keeps referring to the parties -

THE COURT: Yes.

MR. ROSENBERG: - and talking about the Creditors Committee. The Creditors Committee is not the bank lenders. There's no evidence of any agreement by the bank lenders -

THE COURT: But there is.

MR. ROSENBERG: Where?

THE COURT: Could you - Mr. Bernick, I'm sorry, but that's not really too legible at the moment because of the highlighting.

MR. ROSENBERG: I can see that, Your Honor, even under the highlighting.

MR. BERNICK: It says, In consultation with certain of the largest holders at the time of the bank debt. And the full sentence reads - that would be page 7 - thank you, it says, This rate was negotiated between the debtors and the Creditors Committee in consultation with certain of the largest holders at the time of the bank debt claims. I'll note also, that I believe that the bank lenders also had a joinder in this brief in addition to filing their own, which may be a misstatement about that, but I think that's true.

THE COURT: Okay, so -

MR. ROSENBERG: We're certainly given that there's no, quote, "agreement". The question is whether the bank lenders were consulted, and I assume they were consulted by the Creditors Committee, but it's not - this is not an agreement by all of the bank lenders. At most what we have

established here is that certain bank lenders were consulted at the time, bank lenders who are no longer here, who aren't all the bank lenders. Let's just imagine Bank XYZ. Bank XYZ, there's no - wasn't consulted. There's no evidence that there was any type of bank vote. There's no evidence that the bank agent went back and reported to the bank. There's no evidence that Bank XYZ had any involvement in this case whatsoever. What is the compelling equitable circumstance to take away Bank XYZ's contractual default interest and give it over to the equity holders? The answer, Your Honor, is none. The bank lenders as a group, the bank agent, none of them are party to any type of agreement. All that we have in this record, the entire record that we have in terms of bank lender involvement in this entire process - We've heard a lot about the Creditors Committee and its deals. All we've heard about the bank lenders, as I say, two letters talking about post-petition interest in 2004 from two individual letters and that statement. There's no agreement by the bank lenders, no vote by the bank lenders, no plan support agreement by the bank lenders, nothing by the bank lenders. What we have is the Creditors Committee. The Creditors Committee is not the agent of the bank lenders. It is simply a fiduciary, but that's it. It can't bind the bank lenders. It's not everybody. It's not the bank lenders, and how we can take away the rights an individual bank lender has on the

contract because the Creditors Committee four years ago talked to a couple of the larger holders, and I don't know what was said or done. All we have is this statement. We have no idea of anything more than that. That cannot be the compelling equitable considerations necessary in order to take away the right to default interest. Why don't I turn now just as a general matter to those equitable considerations, and, you know, the Third Circuit has not ruled on the issue, but the clear trend of the decisional law is that creditors should receive all that the contracts provide for before equity retains value. Consequently, I submit that the Third Circuit would adopt and this Court should follow the Sixth Circuit's decision in Dow Corning, I think, you know, the First Circuit in the Jen Correlli (phonetical) case, the Ninth Circuit in the Future Media. The trend is to enforce what the contract says. I think one was a prepayment penalty case, one was an attorney's fees case, but the trend is clearly, as a matter of equity, enforce the contracts in the case where equity is retaining value. Let's go into the Dow Corning standard for a second because I think it really bears the Dow Corning standard on whether this is sufficient or not. That standard is as follows: When the debtor is solvent, and to me solvency, Your Honor, every case that's looked at, look at pages 17 to 20 of our brief, solvency for these purposes is for purposes of the

fair and equitable rule, is equity retaining value, and if equity is retaining value for these purposes it's considered solvent because it's not - it's fair and equitable because it's coming out of equity who agreed to these contracts not out of other creditors who didn't sign onto the contracts that had these rates of interest. Where the debtor is solvent, and I urge the Court to go back and look at pages 17 through 20 of our brief again.

THE COURT: Well, I've looked at it and most of the cases that you cited.

MR. ROSENBERG: Thank you, Your Honor. The presumption is that the Bankruptcy Court's rule is merely to enforce contractual rights of the parties and the role that equitable principals play in the allocation of competing interest is significantly reduced. Despite the equitable nature of bankruptcy, the bankruptcy judge - and this is right out of the case - does not have, quote, "free floating discretion to redistribute rights in accordance with his personal views of fairness and justice". Rather, absent compelling equitable considerations when a debtor is solvent it is the role of the Bankruptcy Court to enforce creditors' rights - and those are contract rights. And as is said, While the debtors would have the Court look at this, the payment of post-petition interest due under a contract to be a gift to which a lender needs to show it is equitably

entitled, that a contribution has to be made or something else, Dow Corning says the opposite. It correctly holds that it is a right which can only be taken away after the debtor has demonstrated compelling equitable considerations for doing so. And what is the compelling equitable considerations here to support taking away the contractual rights? None of the traditional equitable factors courts have considered for denying or taking away post-petition interest could I find here. Credit agreements governed by New York law, there's no claim that default interest not allowable under New York law. The testimony of Mr. Ordway, uncontested on this point, is that the 2 percent default rate is within the industry standards, and in our brief at page 30 and footnote 31, recite a host of cases. There's no evidence that the bank lenders have delayed or impeded these cases. No evidence that they've done anything at all other than ask now to be paid the rate set forth in their contract. This is very different than the Coram case where among other things there were terrible conflicts of interest between the lead lender and the restructuring officer running the company. As of August 28, 2008, when the affidavits were filed, equity was retaining approximately 1.8 billion of value. No other creditors are harmed by the bank lenders receiving post-petition default interest distinguishing this from the Adelphia case where, even aware as creditors of the holding

company were being harmed, they found it would be inequitable because even though they weren't creditors of the same company they were still creditors. As we discussed, the bank lenders didn't sign any agreement to any particular interest rate. No evidence they were ever asked to sign something. All we had, as I said, is two letters in 2004 complaining about interest rates, and the statement from the Creditors Committee that some lenders, whoever they may be, some unnamed lenders were consulted back when no idea who they were, how much they represented, or why as a matter of law other bank lenders should not get their interest rate because these people happened to be consulted.

THE COURT: Are the banks not on the Creditors Committee? Banks held most seats on the Creditors Committee?

MR. ROSENBERG: The bank agent has a seat on the Creditors Committee and there's no evidence whatsoever that Mr. Mayer of JP Morgan was acting as anything other - nor could he, as chairman of the Creditors Committee as fiduciary for the Creditors Committee when dealing with the debtors. I think all the correspondence in exhibits filed indicate that everything addressed to Mr. Mayer was in the capacity as Creditors Committee, support his role as chairman of the Creditors Committee. He's not representing the banks nor could he has a legal matter when he's on a Creditors Committee he is the fiduciary for all and Your Honor it's

simply irrelevant that he happened to be a member of the Creditors Committee. And I think in terms of the conduct of the banks in terms of, quote, "breaching the agreement that they're not even party to", I've heard Mr. Bernick mention a lot of things that the banks were doing, what they were thinking, what they were doing. They were betting. They were hedging. They were directing. There's absolutely no record of any of that in evidence today. What's in record is two old letters and an in consultation. There's no evidence of a bank vote. There's no evidence this was presented to the banks. There's no evidence that the banks directed anyone to do anything. All we know is the Creditors Committee cut a bargain, and they'll discuss the bargain, and that they may have consulted - or, Your Honor, excuse me, did consult with some holders at the time who could not possibly bind all of the other holders and are, I believe, Your Honor, long since gone from this case. The debtor also mentioned that the bank lenders had some obligation in connection with the debtors' financials to say something or to make a contribution to this case. I'm unclear, Your Honor, what the bank lender is supposed to do. You vote on a plan. There's a disclosure statement. There's a plan. You should raise your hand at the time of the disclosure statement hearing, I think, you know, prior to plan confirmation, but what is the bank lender supposed to do? It's my friend XYZ bank in

Washington again. A, is he charged with reading the debtors' financial, and B - what is he supposed to do? Send a letter to the SEC? Raise - send a letter to - file something with the Court saying, I disagree with the interest rate that the debtors are utilizing for purposes of their financial statements. The answer is, the first time that anything happened, when the term sheet came out that actually the debtor indicated was planning to go forward with on the plan. The bank lenders raised their hands, wrote a letter, said, I object, and here we are. And in terms of the contribution that the bank lenders are supposed to make, I don't think - the standard is not that you contributed, you know, putting us on Mr. Ordway's declaration which I believe does show how the bank lenders enhanced the case, it's irrelevant. There's no obligation in order to get what's due your contract where equity is retaining a value that you make a contribution to the case, some positive act of good. I think the question really comes down and this is where Your Honor has been heading, because I think once we're past the point you're entitled to at least post-petition interest as a matter of law, whatever that rate may be, it all comes down, Your Honor, to Dow Corning. The final question is whether, absent some actual inequitable conduct on the part of individual bank lenders, the Court can take away the individual bank lender's right to post-petition interest because of what

someone else may have done? Some agreement by the Creditors Committee? Because of what someone else is threatening to do, and the Equity Committee walking from the deal they cut with others, but certainly not with us? Or because the bank lenders have merely asked to be paid amounts due to them under their contracts. Again, the Dow Corning standard is that while the Court has discretion here, it's not free-floating discretion. The bank lenders submit that an equitable consideration cited by the debtors which don't point to actual conduct on the part of any or maybe at most the one or two substantial holders, individual bank lenders apart from enforcing the contract's rights and which don't fall within any recognized state law equitable doctrine that accepted by the Court would be just this type of disfavored free-floating equitable discretion. And let's turn again to the equitable consideration decided by the debtors, and again, Your Honor, it comes back to the, quote, "deal", and I'm going to leave it to the Creditors Committee to discuss the deal itself and why the debtors could not rely on it as that they say that they did, but there's no dispute in Kensington and other cases, § 1103 of the Bankruptcy Code, the Creditors Committee cannot, does not, impossible to bind the bank lenders. There is no deal that's being breached, reneged on, or anything else but a bank lender, because there's no evidence of anything other than two old letters

and this in consultation statement in the Creditors Committee's statements. And I will also point out, Mr. Bernick says the contracts of are sort of who cares contracts. It's who cares what they say? Those contracts do say the debtors signed them, that you can't change a Creditors Committee - a bank lender's interest rate without their consent. Now, once you get to a plan, they obviously can be outvoted, but there's no deal that anyone can cut outside of the bankruptcy plan process which would trump the credit agreement that takes away that creditor's right to say, This is my interest rate, and I want my interest rate as I'm entitled to my interest rate. We also, and again, Your Honor mentioned Mr. Mayer being on the Creditors Committee, there's no evidence that anyone can point to in the record that he agreed to anything on behalf of the bank lenders. No statements saying, On behalf of the bank lenders, I hereby agree. As opposed to his role as a Creditors Committee member, which was the role he was when he was dealing with the debtors, it's the role, and I'm sure Stroock ably represented him, so the role he had to have when he's on the Creditors Committee. He's not everybody on a Creditors Committee, hopefully, as a creditor you're required to be, but at that point you put aside your individual creditor hat. You're representing everyone. You're not cutting deals for others, and there's no evidence that he cut this deal for the

bank lenders as bank agent. And again, he couldn't. The credit agreement, Section 13(1) says quite clearly what the agent's responsibilities and roles are. He would go beyond the contract if he did that. The debtors know that. They're parties to the contract. All that you really have is Mr. Shelnitz' declaration that the debtor supplied that Mr. Mayer did, quote, "not do anything to confirm that he was not impermissibly making agreements on behalf of the individual bank lenders". He was not - that's not the evidence that he did not go out of his way to state, I am only acting on behalf of the Creditors Committee, not the bank lenders, and I hereby confirm that to you. He's on the Creditors Committee. That's the role you're dealing with him until someone - unless he - unless there's evidence that the bank group as a whole directed him to act as their agent and that he was assigning stuff on behalf of the bank group and that they've modified the credit agreement to allow him to do so. And finally, I come down to the last point, and it's the point Your Honor mentioned when dealing with the Equity Committee that, Can the bank lenders as a matter of equity forfeit their contract right to post-petition interest because the successful assertion of that right will cause the Equity Committee to walk from the asbestos settlement? That's what we heard. That's the result that has been predicted. It may have been, it may not. I will not, unlike

Mr. Bernick, speculate as to what is in other people's heads whether they're betting, hedging, or anything else. But, this type of claim that a right must be forfeited in order to prevent a complex settlement from unraveling has been rejected by the Third Circuit in AEWI, Second Circuit Irivium (phonetical), Fifth Circuit Aweiko (phonetical) -

THE COURT: You don't need to argue that point. I already indicated that I am not going to pay attention to that. The Court will not be held hostage to somebody saying they're going to walk away from the deal if I determine as a legal proposition that that's what I have to do, that's what I'll do.

MR. ROSENBERG: Okay. In sum, there's nothing in the record that justifies that as a matter of law the extraordinary result that depriving the bank lenders of their contractual rights, trenching the value of such rights to equity holders or you're retaining billions under the plan. Now, Your Honor, I just wanted to go back to my brief for a moment and page 43, and I think this is the point Your Honor mentioned which is the right to default interest because I don't think there's any dispute that there is an entitlement to some post-petition interest under the Bankruptcy Code. Your Honor's question is whether that's a right to entitlement to default interest, and to me there is no distinction. New Valley said that your entitlement - that

once you're changing anybody's rights under a contract, and they have a right to post-petition interest in accordance with the rates set forth in the contract, that's in the contract, default or otherwise, that's a contract right. When you're changing that you're impairing somebody. So there is clearly an entitlement because otherwise what would you be taking away? The question then is, does the fact of bankruptcy somehow blunt the entitlement to default interest as opposed to pre-default contract interest? And the answer there is, yes, Your Honor, there has to be. There's no law at all that states that bankruptcy waives the consequences of default. All that bankruptcy does, the only section - and we can point to their, I guess, two sections - Automatic stay. You're obviously, you are prevented from enforcing the consequences of a default against the debtor. We can't go ahead and say, Give me my default interest or I'm seizing your assets. That doesn't mean you don't have a right to them. That doesn't mean the consequences are waived. It simply means you can't collect on it today, but there's no law that I'm aware of, Your Honor, that says simply because it's a bankruptcy you're excused of the consequences of a default. Quite frankly at that point, Your Honor, I'm not sure why any court has ever paid - allowed to be paid and why any debtor has ever paid default interest because I'm sure there are many, many cases where all the defaults occurred

post-bankruptcy, and if that's the law, then the right to default interest, quite frankly in most cases is non-existent even though it has been allowed and paid and as Your Honor pointed out in Dow Corning which both myself and Mr. Bernick were involved in, there were no pre-petition defaults in those cases either, and the Sixth Circuit ultimately found that the presumption was in favor of default interest, and I believe that this very same argument was raised in that case and rejected by the Sixth Circuit. It looked eerily familiar when I saw it in this case because I had seen it some eight years before. It was considered. It was rejected. It was rejected because there is nothing in the Code that relieves you of the consequences of default. The only other provision in the Code is the *ipso facto* clause that says to the extent you're going to take away a right from the debtor, the debtor's going to lose something, that is unenforceable, and that has a history, Your Honor, because prior to the enactment of the Code in '78, there were provisions in contracts. They were enforceable. It essentially says, Whatever rights the debtor has, it loses upon bankruptcy. We're not taking away any right from this debtor. We are enforcing the rights we have against the debtor. We are not able to collect on them today, but under a Chapter 11 plan that ultimately deals with our rights, that's when we're entitled to receive the benefit of rights, including the

rights we have as a consequence of the default, who we may not be able to enforce immediately, but ultimately, the debtor has to satisfy its obligations as result of that default. It has to do so under a Chapter 11 plan, and if it doesn't do so under that Chapter 11 plan, the equity holders can't get value.

THE COURT: All right, so the answer to the solvency question from your point of view is all the cases simply say that in this context for fair and equitable, if equity gets a return, then the debtor is solvent. Whether or not - It's not a mathematical test of any type. It doesn't matter whether the debt - It's not a balance sheet test -

MR. ROSENBERG: No.

THE COURT: It's nothing. It's just a return to equity, period.

MR. ROSENBERG: Well, it's not a nothing. It is part of the fair and equitable. If you look as many times what an equitable factor that the courts that have parsed through this understand, it's that equity receiving value is one of the factors. That's where a lot of this confusion, as I said, Your Honor, arises is that there's the belief that somehow it's a separate determination. The determination was, all creditors should be paid. That's what's fair - It makes a lot of sense, Your Honor, that why should the debtor do better equity in bankruptcy than outside of bankruptcy.

It should satisfy it's obligations. The fair and equitable part comes in when other creditors are harming each other, not when they're enforcing their rights against the debtor. The debtor's the one that signed the contract. They shouldn't do better simply because. And, Your Honor, I have three pages of cases discussing this issue. I couldn't find a single case in the context of a solvent debtor that much less ruled the way the debtor wants. I couldn't even find one that discussed it because, Your Honor, it is so far fetched a concept that the debtor can retain billions of dollars of value, yet for purposes of the solvency consideration as part of the fair and equitable standard as to who should get what, they should be considered neither solvent nor insolvent. It's not only too cute by half, Your Honor, it's just too cute, and I think if you look at the Armstrong case, one of the things that is quite apparent from that case is that any scheme whereby equity retains value before creditors are satisfied in full and Armstrong actually referred not satisfaction in full with allowed claims but satisfaction in full of claims. That that is disfavored and disallowed in the Third Circuit and if the scheme in that case to get the warrants to equity traveling through the asbestos creditors was $10 million worth of warrants was something the Third Circuit disfavored, I cannot imagine what the Circuit's view would be of the case where equity gets $2

billion of value through some scheme where solvency is made not part of the plan but something outside of the plan that first you say I'm not solvent, but then you have a plan that has the greatest indicia of solvency of all time - equity value at the bottom. That's solvency and it's the whole purpose of the solvent debtor exception, it's not to protect equity. It's not something they could hang their hat on with some scheme that says, I'm going to look at it in a vacuum. I'm going to look at in a balance sheet. It's part of the fair and equitable standard. It's only arising in connection with this plan. It doesn't arise outside of this plan, and in the context of this plan, equity is retaining value, that's all you need to know for purposes of solvency, and I think that that is well-ingrained in 1129 when Congress amended the Code and the incorporation of the absolute priority rule.

THE COURT: Okay.

MR. ROSENBERG: Thank you, Your Honor.

THE COURT: Thank you. Mr. Kruger?

MR. KRUGER: Your Honor, Lewis Kruger, Stroock, Stroock & Levin for the Unsecured Creditors Committee. I guess, good afternoon. I thought I was going to say good morning, but I guess not.

THE COURT: I think it's afternoon.

MR. KRUGER: Your Honor, I realize that as cases go

on, various things happen. Deal fatigue sets in. People become impatient to see the end, and eight years is a long time, and I listened to Mr. Bernick very, very carefully this morning. He always speaks articulately and with great passion, and I can hear him saying to himself, it's hard for me to imagine why after eight years and we worked so hard at the estimation process to beat down the asbestos claimants to get them to accept a deal, why all of you creditor types are ungrateful for that effort and not willing to accept the interest rate that we have provided to you, and didn't you, after all, agree to that interest rate at one time? And the answer to that question is, Your Honor, yes we did. We did agree to a 6.09 percentage rate in January 2005, and we did that in connection with a plan in which we were a co-proponent. That plan, Your Honor will recall, only too well, I'm sure, provided for a full-scale estimation process, the conclusion of which would be a determination by the Court as to the estimated value of the claims of the asbestos claimants, and the debtor would provide the funds in that amount and the asbestos claimants would not be impaired and would not have the right to vote, and I remember being in court and having Your Honor say, very hard for you to believe that the asbestos claimants would not have a right to vote. That plan went nowhere. Part of the provisions of the agreement that was reached in January 2005 was that there

would be approval of a disclosure statement supporting that jointly proposed plan by November of 2005. That never happened. So in 2006, yes, there was another agreement with respect to the interest rate, but that plan, also, never happened. The plan that has now been filed is the result of an agreement between the debtor, the equity, and the asbestos plaintiffs and the property damage claimants and perhaps the future claims representatives. Well, the one party not proponent of that plan is the Official Unsecured Creditors Committee. We were not a participant in those negotiations. We were not asked to participate in those negotiations, and I always thought we were not asked to participate in those negotiations because no one wanted us standing there saying how a 6.09 percent deal is really dead because that plan has gone away. The modification to the floating prime rate has also gone away. Those plans never saw the light of days. Your Honor terminated exclusivity in 2007, which was also a precondition for the continuation of that agreement. All of that came to pass. There was no agreement. Those interest rates no longer obtained with respect to those plans, and yes, we did indeed ask people in January of 2005 and before that whether they would support the 6.09 percent interest, and yes, some of the large holders said they would with respect to that plan because we were looking for the conclusion of this case in a reasonably short time frame, not

three and a half years later when we still are not at the conclusion of this case, and at best, we're looking at a 2009 event. So, the lenders themselves have been sitting with this debt on their books now for nine years. The debt itself has matured during the process of these years, all on its own terms. Now, Mr. Bernick says, Nobody ever told us how the world had changed, but Your Honor, in 2006, the world did indeed begin to change after the 2006 agreement. First of all, the PI estimation hearing, and yes, Mr. Bernick did a fine job and proceeded in earnest. The questionnaires were ordered and filed. There was enormous progress being made in that direction. The ZAI decision by this Court -

THE COURT: Mr. Kruger, excuse me, I'm sorry. My computer is doing something very strange. It's not typing so just a minute till I see what's - Okay, I think I've picked up but I don't want to lose what you're saying, so -

MR. KRUGER: What I was saying, Your Honor, after the January 2006 agreement, lots of things changed. The PI estimation process went forward in earnest. You ordered questionnaires from the asbestos claimants. All of that made, obviously, a significant difference. You issued a ZAI decision. Many of the PD claims were settled, and then in August 2006, the Sixth Circuit decided the Dow Corning case, and for those reasons, including the fact that Grace did so well in operating its business, and we're very, very pleased

about that, the world changed and the bank debt began trading in the marketplace at the default rate. So, in early 2007, in conversation with Mr. Shelnitz, lawyers from Kirkland & Ellis, and others, we began to say to them that the bank debt holders were assuming that they were going to be paid the full default interest rate, and that it was not sensible to rely on anything other than that if they indeed were going to seek the approval of any reorganization plan that would be approved by the bank debt holders. So there was no question that the debtor did not rely on that, and a point of fact Mr. Shelnitz recalled from time to time during his negotiations with the various other parties to which we were not invited, to say that they were still fighting for the 6.09 percent interest rate to which I would always say, Thank you very much, but I remind you again that the bank debt holders are looking for a full default interest rate. There is no question that the debtor did not rely, could not have relied, should not have relied on anything that had been negotiated previously as though there was some agreement - you know, what they really would like to do is take an agreement with respect to a plan in January of 2005, everything else disappears. The only part that should remain still constant is the interest rate for their purposes, and therefore, that should now become an equitable basis for a determination that the 6.09 is a fair and equitable rate. There is really no

basis for that, Your Honor. That's not what occurred. It was a negotiated deal. All aspects of the deal were part of the same transaction. When you take away all the other parts of the transaction query why does that one part stand out? It stands out because it's comfortable and helpful for the debtor because it also enables them to retain for the equity the billion plus dollars of equity that their reorganization plan acknowledges a reorganization value being retained for the equity. Now, the Committee itself, of course, Your Honor, never gets to vote on a plan. Committee members may vote on a plan and creditors may vote on a plan, but the Committee itself never votes on a plan. It doesn't approve or disapprove. They may say something in a disclosure statement with respect to a plan, but that's as far as it gets to go, and I always thought, Your Honor, that the issues that we're confronting today really were 1129 issues, and I suggested when we were here at the status conference, that it would be a far better time to hear these arguments at the conclusion of hearings on the plan and disclosure statement not as an objection to claim allowance. In any event, Your Honor, I just want to point out again that, you know, Mr. Bernick's charts, one of the charts to your left, I don't know how we can describe it in the record but the chart to your left which shows the January 2005, 6.09 percent. It doesn't show it in those terms, but that's the agreement that

Mr. Bernick has referenced to. Yes, there was that agreement, as I said, but of course, the underlying premise of that agreement went away. There was another modification in January of 2006. That agreement also went away in the sense that the plan that was filed was not a plan in which we were a co-proponent and point of fact, we were never asked if we wanted to become a co-proponent of that plan. So this was really well outside of the Unsecured Creditors Committee and their role in this case, and their role in this case maybe would have been different had indeed we had been consulted in part of the negotiation process and the like, which we were not. A final comment, Your Honor. Mr Bernick referred to the fact that we say that the Court ought to be aware now of the fact that there were other creditors who may be claiming default interest rate as well. That's not to say that that makes this hearing one about that or that now relates to this. What we're saying is that there are others who will have similar kinds of claims including ordinary trade creditors who have on their invoices statements that say, For every month you don't pay us, interest runs at the rate of X percent a month. Those will also be presented, I assume, by others in due course, but those are claims that are out there as well, and our only purpose was to make sure that the Court was aware of those claims as well as part of this entire process. Lastly, Your Honor, I think the Armstrong case

makes one thing clear and that is that people are entitled to change their minds. Mr. Bernick has given perhaps the greatest demonstration of the ability to change one's mind. He was the person who suggested that we ought to have the Committee and the debtor as co-proponents of a plan and look where we are today. Now, Mr. Bernick's in love with the asbestos claimants and they are co-proponents of a plan just the reverse of where he was before. The Committee is also entitled to change its mind and it's view but did not have to do so in this instance because it all went away without the Committee having done anything. The plan that is filed is not one that the Committee approved. It's not one that was the premise from the negotiation of the interest rates that the Committee agreed to. With respect to the other issues, Your Honor, I think we all would like to see these cases conclude. We would like to see them conclude promptly, but they should not conclude promptly by looking away from parties' entitlements under the law, and in this particular case, the bank creditor's entitlement to default interest. Thank you.

THE COURT: Anyone else before Mr. Bernick has some rebuttal? All right, Mr. Bernick.

MR. BERNICK: I just would note as a footnote, not only do we have the brief that was filed by the Creditors Committee, we actually have Mr. Kruger's own affidavit in the

case that says, This rate was negotiated between the debtors and the Creditors Committee in consultation with certain of the largest owners at the time of the bank debt claims. So, that kind of leads me to - I'll come back to that in just a moment, if I can just gather my notes here for just a second. I'll want to begin with that solvency and just touch on it for a couple of minutes. There's a fundamentally different notion than solvency that's been advanced here that finds no support in the absolute priority rule which is what it is that really is at the centerpiece - at least their construction of the absolute priority rule, at the centerpiece of the insistence throughout that it is a hallowed principle of corporate law that what we're trying here can't be done. Mr. Rosenberg said that solvency is only a factor to be considered, only a factor to be considered as part of the equitable analysis, and that solvency is established when equity gets something under a plan. The fact that equity may get something under the plan, does not even trigger the absolute priority rule when it comes to post-judgment interest. With respect to post-judgment interest, 1129, working with 502, says that if the claims of - in this case the bank lenders, are being paid in the allowed amount, they're being paid in the allowed amount that is another way in which 1129(b) is satisfied. It's only if the claims are not being paid in the allowed amount, even

given to the absolute priority rule. So the formulation that's been given with respect to what solvency means here, which is that equity gets something, doesn't even find support of the absolute priority rule. Dow Corning doesn't stand for a different proposition. Dow Corning has been much cited and misunderstood. I don't recall actually Mr. Rosenberg being there at the time. I was there at the time. I litigated that case at the trial court level and on appeal, and what's significant about the Dow Corning case is that first of all it doesn't address the issue of what the test for solvency is at all. Dow Corning was a case in which solvency really had never been disputed by the company, never really was at issue actually in the case itself. That is to say, there were competing estimates of solvency because we never got to the point of having an estimation at all. Dow Corning was clearly solvent at the time that these issues were litigated because they were litigated pretty much after the fact, but the really key thing for understanding the appeal, and this is nowhere to be found in all their citations of Dow Corning is that the issue actually framed for decision in the Dow Corning case had nothing whatever to do with either a determination of solvency or a determination of what 1129(b) would require by way of an equitable analysis, and the reason for that is that the essence of Dow Corning's position at trial and at the Court of Appeals was

not based upon any of that. Dow Corning's position was based upon the fact that the interest rate that was adopted in that case had been incorporated into the plan of reorganization. It had not been appealed by the unsecured creditors or the Unsecured Creditors Committee, and therefore, that feature of the plan became final, and because it became final it was not subject to any kind of revision under the application of the fair and equitable standard under 1129(b). So, the issue of what it takes to find solvency and if there is solvency, what the equitable analysis actually looks like, there was no record whatsoever. Indeed, we asked at the trial court level to have a record made about what the equitable analysis would look like, and that request was denied. So the issue really went before the Court of Appeals solely on the question of whether this issue could be opened up or whether there had been a final judgment, final order not subject to appeal. It already defined what the applicable rate of interest was. The Court of Appeals said, We don't believe that the terms of that final rule are sufficiently clear, and therefore, we're going to construe it in light of what things we believe 1129(b) might call for, but there was no record. It was basically the Court of Appeals was reaching out saying, Well, here's what the 1129(b) analysis might look like, and because they didn't have a record, they remanded the case for the determination of what would be fair and equitable in the

principles that they applied. So the idea that Dow Corning provides instruction on the issue of what is solvency and then how solvency would bear upon the fair and equitable determination of the facts on this case is as completely and utterly without foundation in that decision. Dow Corning had nothing to do with that proposition. It's a far reaching decision, but it doesn't deal with the facts that are uniquely presented here. The statement is made that Dow Corning is a trend. If it is a trend, it's a trend of first impression in this Circuit. In this Circuit we don't have any such trend, and you can point to the District Court and the Bankruptcy Court opinions, which we have in our brief, that are completely different from the Dow Corning kind of analysis, that are very much an even-handed balancing of the equitable factors, and that's what we believe is appropriate here. Solvency though remains a threshold issue. If there is not solvency and it is their burden to demonstrate solvency under 1129(b), if there's not solvency, they're out of luck. So, it's not a factor. It is a *sine qua non,* and it is their burden in order for them to escape the reach of 502. It is their burden in order to escape the reach of 502, and they haven't been able to meet that burden, not by any stretch of the word. Well, we still at the end of the day come back to the factors that ultimately are the ones that have most bite and are most persuasive here, and that's why

we have framed the issues in the way in which we have done. The issue that really has bite is, assuming that they could get themselves into the zone of solvency, which they have not done, what is fair and equitable. What is fair and equitable? And thus the most prominent fact that stands between them and even a straight-faced test of being able to say it's equitable for them to get 100 cents of everything that they believe that they're ultimately entitled to - not even entitled, but that they can ask for, the biggest problem with that is their entire conduct during the course of this case and continuing on to today. The statement was made by Mr. Kruger that, Gee, you know, I actually felt there was a certain amount of brotherly love there. Mr. Bernick has not been through as many battles as I have. I know what battle fatigue is all about. I know what case fatigue is all about, and that's really what's going on here is there's an expression by the debtor of "fatigue". Whey do we have to keep on with this, and this is not a fatigue case. This is a case, God knows, we've shown that we have stamina. We will continue to have stamina. This is a problem not with our being concerned about fatigue. This is a problem with our being concerned about the rewriting of history, that basically taking what has happened in this case for years and pretending that it is not so. So, Mr. Kruger says, Well, he did agree. We now know the affidavit, it says, he agreed,

the Committee agreed, and they agreed with authority. So, there's no issue in this case any more about how, Oh, no, I didn't know, you know. The lenders were onboard. Everybody was onboard, and they made a deal -

THE COURT: But what they're saying is, they made a deal for a plan that went nowhere, and so, the deal that they made wasn't for this plan. That's what they're saying.

MR. BERNICK: That is a fair point. They could at any point under the terms of those letters walked away and said, We're not standing by that deal because that deal was for a plan. So this is why the subsequent history becomes so key. They never did it. So, the new plan comes onboard. Did they walk away? No, they stood by their letters. They stood by the agreement. He says that we're happy to stay put, in January of 2006, there are more developments in the case. There's estimation. They didn't walk away. They stayed put with respect to that agreement.

THE COURT: But that's also for a different plan. I think what we need to do is get to this plan, the one that was just filed and as to which the negotiations for the 6.09 percent are now on the table.

MR. BERNICK: Yes, but I think in connection with this plan, it's the same story. They're still sitting here today with those letters in place. They're not abrogating those letters. They're not saying that they're not relying

upon those letters, and in connection with the negotiation of this plan, Your Honor, as we know, they got the term sheet, and when they got the term sheet, the didn't say the deal is off. Indeed, as we saw from Ms. Krieger's email, there was no statement to that effect at all. The essence of what they're saying - that's this one here.

THE COURT: But that email went from Ms. Krieger to the Committee; correct?

MR. BERNICK: No, it went from Ms. Krieger to Mark Shelnitz as the general counsel in W.R. Grace.

THE COURT: I'm sorry, from Grace though to the Committee.

MR. BERNICK: No, no, it's from the Committee to Grace.

THE COURT: Oh, I'm sorry. Okay, this came from the Committee to Grace.

MR. BERNICK: Right. So the deal was a draft term sheet, and it went out, and this was the only comment that came back. So, we actually went ahead. We did use the rate. We incorporated them to the term sheet. They knew that the negotiations were taking place. At any point they could have revoked the letter agreement they had. They could have told us, we're not onboard. They never ever did that. Those letters remained in place. We sent the term sheet. This is the only answer coming back. It doesn't say, Deal's off. We

don't like this plan, and then say that, Oh, our deal only relates to the prior plan, and in this case, as we sit here today, Your Honor, there's nothing that revokes that deal. They want to argue to have Your Honor give them more but they're still not revoking that deal. So, we can't have really a clearer case in which the conduct of the Unsecured Creditors Committee, obviously, with the knowledge of the bank lenders has been, in the context of this case, to insist that they're basically asking the Court to have it both ways. That they want the letter to remain in place, but they want to ask the Court for more. Now, Your Honor, in fairness, we have incorporated into the plan the letter rate and we're prepared to stand by that, but this is why I come to points one and two that wrote up on the board that we believe that this agreement should be dispositive. They can't have it both ways. They can't say, Gee, Judge, we really want you to determine this matter and it might be more or it might be less. They don't say that. They say, We just want not just the letter, we want more than the letter, but they don't want to expose themselves to the downside that they're actually entitled to less than the letter. So, they come in with the letter in hand. They say, It's over here behind here, but gee, by the way, would you please give me more, and this is really the essence of - in the conduct of this courtroom is also frankly somewhat surprising. The conduct in this

courtroom when confronted by this whole problem of what the Committee has done and the Committee even today has not revoked that letter. The statements that are now being made by counsel are as follows: First, there was no evidence that the bank lenders were involved. Well, that's just not true. Then it was those two old letters. Well, that's just not true. The statements that were made in court just this morning, just those two old letters and oh, by the way, this brief, and that's not our brief. Well, we now know that there were the two letters. We also know that were actually emails like this, the statement with respect to Mr. Mayer, this is an email that was sent from Bob Tarola, who was the CFO of Grace on November 8, 2004, and it was produced in this case, and he's talking to basically the CEO, the financial advisor, other people at the company, and he says, Mar - Mar was the guy who worked for JP Morgan who was the agent and sat on the Commercial Creditors Committee. It says, I spoke with Tom this morning. He said he is willing to compromise, but the Committee reps only hold a small tranche of the bank debt, and the non-committee holders are pushing for a full default rate. I asked them to work with us on a rate of about 4 percent. He will get back to me tomorrow. The idea that this is all just a couple of old letters, this was a robust negotiation. There's co-tempering it's evidence of a negotiation. The constituencies for the unsecured creditors

were in there pitching. Some for default rate, some that were prepared to do less, and they all did a deal, and to sit there and say, Oh, well, there's a couple of old letters. That's just false. Not only is it false, but we now know also that the same deal was in the company's public statements, and, Your Honor, as to whether the public statements or financial statements were made, this company - and it's in Mr. Shelnitz's affidavit made regular, specific reports to the Unsecured Creditors Committee, and the bank lenders often showed up, and these were detailed reports and in those presentations the same deal that was struck off in 2005 and in 2006 was explicitly born into and wed into the documents. So, the idea that somehow they can distance themselves by saying, Oh, this was an old couple of letters, absolutely gives lie to their explicit conduct, the conduct of the Unsecured Creditors Committee and the bank lenders in this case, again, and again, and again throughout this case, that's inequitable. It is inequitable to say, Oh, we'll do these letters. We'll stand by these letters, we'll show up with you, we know that you - we know that you have them in your financial statements. We know that you're working with them in connection with the ongoing negotiations, and then at the end of the day, what do they say? Well, they say, Here, oh, we're not sure we signed onto the brief until Mr. Kruger's affidavit says they are signing on to the brief. We

say, Two old letters. We know that it's much more than two old letters. Ultimately, their proposition comes right down to what it is that Mr. Rosenberg really did argue, because at the end of the day, they don't want to talk about equity. They just want to talk about who was actually legally bound by the deal. That's the essence of what they're saying is that the bank lenders were not actually, legally, contractually bound by this deal with authority, et cetera, et cetera, et cetera, that deal is irrelevant and they can walk away from it. And, Your Honor, they can do that as much as they want as a matter of law. They can't do it as a matter of equity. What we're asking the Court to determine is that equity means something here. It means a bankruptcy process where you can rely upon and trust counsel for the Unsecured Creditors Committee, people who are on the Unsecured Creditors Committee for their word and for the results of their negotiations, and not at the end of the day, have people stand up in court and were no where a part of this process and kind of pooh-pooh it because it's just a couple of old letters, and to have the very, kind of almost unseemly tabloid we had this morning where we have an issue raised about the integrity of Mr. Kruger and his firm for the briefs that they filed -

THE COURT: Well, that was apparently a misunderstanding on my part for which if I have not

apologized, I do apologize.

MR. BERNICK: That's very fair and honorable of Your Honor, but I think that Mr. Rosenberg then just turned around and made the same argument all over again, which even after Your Honor said that, you say, Couple of old letters. No, it is the gentleman here and the Committee today who are standing behind and saying, That was in fact an agreement that was reached, and nowhere -

THE COURT: Well, it does appear to be an agreement that was reached, but whether it's an agreement that was reached with respect to this plan, although, you know, the April letter does seem to suggest that that same agreement is the agreement that the parties have still continued to go forward with with respect of the plan that's now on the table.

MR. BERNICK: And today. The letter agreements, you can terminate them. They have never sent a letter terminating them, even today. I don't know how much, how clear it can possibly be that they want to have it both ways, and really the argument therefore, I really think Your Honor - and I'm going to put this up on the board because it absolutely goes to the heart of the matter.

MR. KRUGER: Your Honor, we've gone over the one hour limit so that we now -

THE COURT: I think we did, Mr. Kruger, I'll allow

everybody to do it, but I've let Mr. Bernick - he had 10 minutes, he now had 25, so I'll give him 5 more and I'll allow everyone else 20 minutes, because - everyone else but Mr. Bernick used up their time. So, I'll allow everyone else 20 minutes and then we'll be finished. Mr. Bernick, I'll give you 5 more minutes.

MR. BERNICK: At the end of the day, Your Honor, the essential argument that they're making here is not doing equity. It is not how the case has been run. It is not how the plan was developed. The essential argument that they're making today is that this is just a question of contract law. Unless somebody was actually bound by that contract, that contract can be passed aside. It doesn't factor into applicable analysis. That is the essence of what they're saying here, is the contract doesn't matter because we didn't sign it. They said it again, and again, and again, and again, and therefore, the real issue here is whether equity means something in this case. Equity is not simply a question particularly because of 502, which says that prior contracts don't govern the question of post-petition interest, and therefore, they've got to come in under 1129, first show solvency, then show equity. They can't show solvency, and they won't be able to show equity, but they don't even really want to show equity. Mr. Rosenberg said this morning, he walked away from all the factors that they

recited. Contribution to the case, use of cash, he says, We don't have to do any of that. The issue of law for Your Honor is whether absent a contract that changes the credit agreements whether - that kind of change whether that means that there is no choice that the Court has but to give them the extra interest.

THE COURT: That seems to be the issue.

MR. BERNICK: Yes.

THE COURT: That seems to be what he's arguing. I don't understand that the Court is faced with a fair and equitable determination that says it's a matter of contract law. Contract law generally isn't based solely on a fair and equitable analysis.

MR. BERNICK: That's exactly right. So their position was essentially the position of contract law that they say displaces the equitable analysis because the equitable analysis is just unremittingly one way. This whole thing stands for the process of doing equity. Their own experts concede that all of their efforts to show that they made some contribution to the case, they failed and the deposition could not be clearer. Not a single one of them work out. So, ultimately what they want to come and the -

THE COURT: One minute.

MR. BERNICK: Yeah - the only issue of bankruptcy law that they can then try to invoke in order to make this

work is to say, Well, I have a new lender. The new lender wasn't there, didn't agree, and therefore, the new lender - you know, we can't find those guys. If they're new lenders, if the come in and buy the securities, they can't be found - We've got to look at this from the point of view of the lightest guy on the block. Now, I'm not going to make an argument about the basis on which they bought in and all the rest. I'm making a different point. We're not saying the new lender can't come in and make the objection. We're not saying that they have no ability to get around the agreement that was reached. This can come in and object. They've got very able counsel, et cetera, et cetera, but what they can't do is to use the fact that they're now objecting to say, We control the issue of fair and equitable. Fair and equitable is controlled not just by the new lender on the block. Fair and equitable is defined by the whole conduct of the bank lenders in this case, and that conduct is very much bound up in the agreement that was reached.

THE COURT: I need to take a recess because I'm losing battery power in my computer, and I need to get new batteries. So, can somebody tell me - I'm not sure. How do I contact someone to get batteries, because I'm losing type. So, I need a 5-minute recess to get batteries. We'll take a 5-minute recess.

(Whereupon at 1 p.m., a recess was taken in the

hearing in this matter.)

(Whereupon at 1:12 p.m., the hearing in this matter reconvened and the following proceedings were had:)

THE CLERK: All rise.

THE COURT: Thank you. Please be seated. Mr. Bentley, do you have any comments?

MR. BENTLEY: Briefly, Your Honor.

THE COURT: All right.

MR. BENTLEY: Two brief points, Your Honor, both from the perspective of the - to add the perspective of the Equity Committee to what Mr. Bernick has argued. First, you heard Mr. Bernick's argument and you saw the evidence to the effect that the Creditors Committee never terminated the agreement they had reached as to post-petition interest, and to the contrary, Ms. Krieger sent an email to Grace's general counsel commenting on the draft term sheet with the asbestos plaintiffs indicating quite the opposite of them having walked away, that they were still supportive of that. The point I'd like to add, Your Honor, is the fact that they didn't walk away, the fact that they did quite the opposite, had very significant consequences to the Equity Committee and to the deal that was reached with the asbestos claimants. You've heard that - from Mr. Kruger that the Creditors Committee was not invited into the room in the negotiations with the asbestos claimants. There was a reason for that,

and that is, in any negotiation, bringing an additional party into the room makes it more complicated, more difficult to get agreement, and the reason it was considered not necessary to bring them in was because we believed, as the debtor believed, that we had a deal with them and that that deal was still on the table. A very, very important belief, we relied it, it had very important consequences. Second point, Your Honor, there's a second equitable point in addition to this absolute essential equitable point. You'll recall the first argument I made when I stood up previously was that there's a second equitable point, namely that what the banks are trying to do here is to get the benefit of the deal that we and the debtors negotiated with the asbestos claimants for which we made major concessions for which we accepted lesser treatment than we would have gotten had we litigated to the end of the road and won. They're trying to get those benefits of eliminating and threat to solvency without giving up a penny's worth of concession, getting exactly the same treatment that they would get if we went all the way to the end of the road and won, and that, Your Honor, as I said before, is the opposite of equity. The one point I want to make as rebuttal is that you heard many, many arguments from Mr. Rosenberg and Mr. Kruger. They didn't say a word in response to that point. They have no argument to the contrary, Your Honor, and we hope that Your Honor will take

that into consideration.

THE COURT: All right. Mr. Rosenberg.

MR. ROSENBERG: It is good afternoon now, Your Honor, and good news for everyone. I will not be using the full 20 minutes. A couple of very brief points. Starting with the equitable standard and Mr. Bernick's statement that the, you know, I start and end with the contract. Well, of course, I start with the contract. I think the Supreme Court says you start with your state law, you know, state law rights. That has to be the starting point. It isn't the end, but it's certainly the starting point, and equitable considerations do play a factor thereafter. However, where equity retains value a bar on those equitable considerations and their ability to take away state law rights is much higher, because there's no equitable principle that says that equity should do better inside a bankruptcy rather than outside, and that is a key point, Your Honor. It is, the company that signed the credit agreement, there's no reason, other creditors aren't being harmed, that the company and its equity holders should benefit by paying less than is due under that contract, absent compelling equitable circumstances that take away such rights. So if there are compelling equitable circumstances because, obviously, let us imagine that you have state law rights, but you have done something heinous to harm the estate. You've done something

that really damages the estate, damages equity. Obviously, that's a compelling equitable circumstance at that point. Equity could say that you could lost you contract because you've hurt equity. What is the conduct during the case. I keep hearing about the conduct during the case, and I keep hearing there's no conduct ever pointed to as to the individual bank lenders. I saw a third letter, I guess, now from 2004 that Mr. Mayer - it was addressed to him as a chairman of the Creditors Committee. It actually stated quite clearly that he said that, I only have a little bit of - I can't really speak for the bank debt. I only have a little bit on here, and they're saying I want default interest. So it doesn't look like Mr. Mayer was listening to the banks. He did what he did as fiduciary for everybody on behalf of the Creditors Committee. You need to show something, compelling equitable considerations of each of these bank lenders who are going to lose their state law claims that there's some compelling equitable conduct on their part to take it away from them, not that the Creditors Committee didn't honor the deal, and I think Mr. Kruger has addressed, and if he wants to address some more the deal and how things have changed and everything else, but what I've hard for the last several hours has been the Creditors Committee did this, the Creditors Committee did that. That's not a compelling equitable circumstance that somebody else

did something and now you won't abide by it, and in considering the conduct, I guess, you know, we did see that some lenders were consulted back in 2004, whether their views were taken into account, whether they were accepted or anything else, I have no idea. There's nothing in the record before us on that point. We just know they were consulted, but what we did hear is that this is a different plan right now and there is zero, point zero evidence that any lender consulted, supported, agreed to, did anything at all to make any type of agreement in connection with this plan. None. I didn't see anything. I didn't see anything past 2004. So, once you've established it's a different plan, whatever consultation support there was back with somebody back in 2004, how can you possibly at that point conclude that it's compelling equitable consideration to take away their rights because somebody was consulted by the Creditors Committee four years ago with respect to a non-existent plan. That cannot possibly be the standard that allows equity to do better in bankruptcy than it would do outside bankruptcy and to do better than their contract allows them. Finally turning to Dow. Unfortunately, I was there, Mr. Bernick, but - and I guess we're still there because the case continues in some form. We're not citing Dow for its facts. We're citing Dow for its standard, and I think the trend in this Circuit, the trend in other circuits is more and more towards

upholding creditors' rights in bankruptcy. As I said the First Circuit case on pre-payment penalties, a good example, the Court says flat out that we're going to enforce creditors' rights under the contract absent some compelling equitable circumstances. So the trend is to enforce those rights. As to solvency, solvency was not mentioned in Dow, and I think, quite frankly, hasn't ever been mentioned in any case, and as I said, Your Honor, the reason it didn't come up in Dow, the reason that it's, quite frankly, never come up before, is I don't think anybody, until this case, has ever considered solvency as some type of a separate basis that one can be not solvent for purpose of consideration of fair and equitable and creditor's entailment to post-petition interests while a debtor walks away with billions of dollars of value. There's no case that supports it. There's no case that discusses it, and the reason is, because it is so far-fetched that nobody has ever quite frankly bought it up to date, and that's why it's not addressed in Dow and not addressed in any other case. Finally, as to 1129. I think there was some question as to the absolute priority rule, as to whether you only need to pay the allowed amount to trigger it. I believe that 1129(b)(2) specifically states that the fair and equitable standard includes the following and it includes paying the allowed amount of the claim, includes, under § 102, it specifically states without limitation and

the law is and the case law establishes that the allowed amount is certainly sufficient in the case of a insolvent debtor that's we all we need to prove once the solvent debtor has come in. That's with the solvent debtor exception, the absolute priority rule comes in. It comes in through the statement that this only includes, not including without limitation, and that's the hook by which all of the law cited in page 17 through 20 of our brief comes in to establish that you can't cram down a lender where equity is retaining value without paying them post-petition interest. Thank you, Your Honor.

THE COURT: Okay, but the issue still is that this plan already provides for post-petition interest. We're not into a circumstance where we're talking no post-petition interest. We're talking simply the difference between a bargained for post-petition interest rate and a default post-petition rate. That's what this issue is.

MR. ROSENBERG: Your Honor, we don't disagree. Quite frankly, you know, I thought all of this was a bit of a sideshow, the issues that were just raised and the debtors about us not being impaired, the issues about solvency. Quite frankly, once we agreed that we're entitled to post-petition interest, you don't need to establish any of those anymore. The difference is that the debtor is saying I can give you whatever interest I want. It's a gift, and what

we're saying is we have a right, but once you cross the bridge that we're entitled to post-petition interest, then that post-petition interest has to start with our state law contract and then it goes, as Your Honor stated, onto the fair and equitable considerations. Is there a compelling equitable consideration for not paying the rate in accordance with the contract? It is that simple. Quite frankly, Your Honor said it at the initial status conference, and nothing has changed and all of that is a sideshow, and the question is whether this Court has found where there is no conducted pointed to on behalf of the banks and none of the traditional equitable considerations have been triggered, is there compelling equitable consideration to take away contract rights in the banks? It's that simple. There are none, and the banks should be paid the full default interest due under their contracts.

THE COURT: Okay. So, really what this comes down it is, you're arguing a difference in application essentially. If I get to looking at the fair and equitable standard, what you're really telling is, the banks are saying that the standard is that the Court has to apply fair and equitable standard if there is no reason not to pay the default rate. The debtor's saying, No, that's not the premise. You only pay the default rate if the banks, in quotes, "deserve it", and to deserve it you have to have done

something that - I'll use these words, "enhanced the bankruptcy process somehow in the context of this case", and the banks haven't shown that they did that in this case, that their conduct hasn't risen to the level of deserving the full default rate. So, that's really what you're arguing. Is it that it's automatically paid unless or that it's not paid as a matter of right unless? So, it's the question of, you know, who has the burden of going forward with the evidence to determine whether the default rate ought to be paid. Is it the debtor who has to pay it unless there's a reason not to or is it the creditor who has to show me why you deserve it. That's really what this is coming down to.

MR. ROSENBERG: That is basically it, Your Honor, I guess we do believe we have made some contributions as set forth in Mr. Ordway's declaration, but that is basically it, and we do start with the premise that where equity is retaining value, that that's how you - there's no further contribution or there's a presumption no further contribution is required by the lenders. They don't have to have done something super good to have earned the right to get paid post-petition interest. If equity is retaining value, they should be paid amounts due under their contract. It's as simple as that, and there's no equitable reason why it should be any different.

THE COURT: Okay, but you keep talking about post-

petition interest -

MR. ROSENBERG: Uh-huh.

THE COURT: - and the bank lenders are to get post-petition interest, a hefty rate of post-petition interest in today's economy, a very hefty rate of post-petition interest in today's economy where three or four days ago people were paying the Treasury to lend them money, I mean -

MR. ROSENBERG: But I might add, Your Honor, people also are paying to - I'm not sure if it would be hefty in today's economy when General Electric, I believe, it cost them 10 percent which is to borrow money the other day, which is about 4 percent more than the rate set for us.

THE COURT: Well, yeah.

MR. ROSENBERG: So, the world's a bit -

THE COURT: Strange world.

MR. ROSENBERG: - Topsy-turvy, but, you know, the question is whether we have to be paid the rate due under our contract, absent a compelling equitable circumstance against us that takes it away or whether the debtor giving us any post-petition interest is sufficient, absent us having made a positive contribution to the case. I think we've made a positive contribution, but I don't think that's the standard here. That is the entire issue, Your Honor.

THE COURT: All right.

MR. ROSENBERG: Thank you.

THE COURT: Mr. Kruger.

MR. KRUGER: Your Honor, I'll be brief. I think Mr. Bernick got carried away when he suggested that perhaps the Committee was not fulfilling its fiduciary obligation or acting fair and equitably towards the debtor. We've done nothing except be fair and equitable towards the debtor. Nothing more demonstrates that than our willingness to become a co-proponent of a plan, and I heard Your Honor actually say a moment ago, What about the agreement? Let me say again so it's very, very clear. We never thought that it was sensible for us to send a letter terminating the agreement because, if you'll recall, the debtor was in the midst of its estimation trials with the asbestos plaintiffs. We thought it helped in terms of the dynamics of that litigation and the dynamics of the relationship for us to continue to look like a supporter of the debtors' program, and we were a supporter of the debtors' estimation program, but the 6.09 percent interest rate agreement is gone. Let there be no misunderstanding about that. It is terminated. It is gone. The debtors terminated if no one else did. They terminated it by filing the plan that they have filed. Second, Your Honor, and I -

THE COURT: Well, I haven't seen the plan yet. I understand it's been filed, but I literally have not seen it. I haven't been in the office yet, so I don't know how the current plan terminated it.

MR. KRUGER: Well, one thing I do know about it is that we're not a co-proponent.

THE COURT: Well, that's so.

MR. KRUGER: And when Mr. Bentley says that he was not aware - he relied upon the 6.09 percent agreement, if he did so it was because the debtor never told him that we had been saying for a year to the debtor that the 6.09 percent agreement doesn't work. Let me just read a moment, if I may -

MR. BERNICK: Your Honor, I'm sorry. At this point I really have - Mr. Kruger has now made a representation on the record that is not consistent with his own affidavit.

MR. KRUGER: I'm going to read from my affidavit.

MR. BERNICK: His affidavit is very, very clear -

MR. KRUGER: It says - I'm sorry, I didn't interrupt you, David, and you're not interrupting me now either.

THE COURT: Pardon me, gentlemen. You will speak to me, not to each other.

MR. KRUGER: I would like to speak to you and not to him.

THE COURT: Then do so, please.

MR. KRUGER: Your Honor, in my declaration I said Stroock advised the debtors and their counsel that the bank debt was trading in the market at a value reflecting recovery of the default rate and that the Creditors Committee

professionals were being told by holders of the bank debt that the holders expected to receive post-petition interest at the default rate. Stroock advised the debtors that notwithstanding any position the Creditors Committee itself might determine to take, any consensual plan should provide for post-petition interest payable at the default rate, for the debtors to hope for the bank debtor holders to vote in favor of such a plan. They knew full well. They knew it for more than a year. For them to then come along and say, number one, we didn't invite you to the negotiation. Number two, we relied upon an agreement with respect to a failed plan, but somehow or other we acted inequitably? If there's any inequitable behavior, the debtor has demonstrated it totally. The last piece of my comment, Your Honor -

THE CLERK: You need to stay at the microphone.

MR. KRUGER: I'll stay at the mike then. Your Honor, the memorandum that's been much of from Ms. Krieger to Mark Shelnitz, April 4th, I think, 2008. I think that was two days after we saw for the first time published the term sheet of the agreement between the debtor and the asbestos plaintiffs. That memorandum, I noticed two things about it. One is that it says, Set forth below are our initial thoughts. We had not yet reviewed anything with the Committee, and secondarily, if you read the last line of it again, Your Honor read it as pertaining to non-bank

creditors. Nothing in that paragraph replies only to non-bank creditors. What it really did was seek to preserve the rights of all the parties so that we may have the hearing that we are in fact having today. That's what that memorandum did.

THE COURT: Well, it certainly doesn't look like that. It says, And two, for all other unsecured claims interest at - whatever that percentage is, compounded annually or if pursuant to an existing contract, interest at the non-default contract rate provided however any such holder may seek to obtain a higher interest rate and shall be entitled to such higher interest rate if the Court determines such rate is appropriate. That's all within subsection two.

MR. KRUGER: That's right and that applies to the bank debt that just as well as the -

THE COURT: No, subsection one applies to the holders of the pre-petition credit facility.

MR. KRUGER: Not it doesn't -

THE COURT: It says, one, For holders of pre-petition bank credit facilities. And then, two, For all other unsecured claims. It's clearly written that way.

MR. KRUGER: But the last section of it -

THE COURT: There's no three.

MR. KRUGER: This -

THE CLERK: You have to use the microphone. It

won't be on the record.

MR. KRUGER: Sorry. It's hard for me to read it. But the purpose of it was to preserve the rights of all creditors to have the argument that we're having today. That was the purpose of it, but in any event, it was before the Committee had an opportunity to look at it and to comment on it.

THE COURT: All right.

MR. KRUGER: One last thing, Your Honor. I don't know whether Your Honor believes that the solvency issue has been determined or not for the purposes of considering whether or not the bank debt holders are entitled to receive default interest. But if Your Honor believes that you need a balance sheet solvency test to determine that, I remind the Court again that the Unsecured Creditors Committee has reserved its right to continued the estimation process to seek that out, if it's necessary. I know nobody wants that, and we don't want it either, but so long as the debtor continues to pretend that they are insolvent and so long as the Court may believe that that issue is not one of 1129's inclusion, that equity retains something, that's sufficient solvency for determining whether or not a lender is entitled to default interest, but if Your Honor believes that you need to know with a balance sheet certainty and a valuation question, solvency, we're prepared to continue with the

estimation process.

THE COURT: Well, here's - I guess here's the problem, and I'm not making findings. I'm trying to articulate a problem. At this stage, I have no understanding yet as to what the value of either - I don't mean the negotiated value, I mean if we have to get into an evidentiary hearing. I don't know what the value of the asbestos personal injury claims, either American or Canadian, would turn out to be. I don't know what the value of the ZAI claims, whether property damage or at least as Canada would turn out to be, personal injury would be. So, there's a whole unknown property damage component that hasn't yet been evaluated, nor has the personal injury component been evaluated anywhere. There are still, according to Mr. Restivo's analysis this morning, some - I don't remember the exact number, 74 property damage claims that are still out there that haven't yet been litigated for a number of reasons, some of which have been settled, some not. I don't know the settlement values. There are other claims that will have to be addressed in the plan, the value of which I don't yet know. So, even if the asset side of the equation can be determined and let's just to make it easy, not by way of ruling, just to make it easy, let's assume that some market capitalization value could fix the asset value. Let's just make that assumption for this discussion purposes to make it

easy, and I'm not making findings along those lines, let's just say it did, then so let's say that the debtor, therefore, its asset side could be determined easily, I still have no idea how the liability side would come out. So, do I know whether the debtor is solvent for a contested plan confirmation purpose if there is no negotiated agreement by which a return to equity could be made? No. I don't have a clue. Do I care if it's a consensual plan so that unsecured creditors can get some rate of interest and equity can get a return? No, I don't care. But do I care in the event that there's a contested plan and I'm going to have to determine whether unsecured creditors get a penny of interest, let alone a default rate of interest, let alone any type of interest, and equity gets anything? Yes, I care a great deal. So, are we going to have to do some type of estimation if in fact this doesn't get worked out and I have to make a determination that I'm called upon to make here and for other unsecured creditors if they ask for more money by way of interest than the plan provides because it's contested and I've get to get into a cram down? Yeah, I guess at some point we're going to be into a full-blown estimation hearing for that purpose. So, the cost and expense will undoubtedly mean that the debtor won't have the dollars to devote to paying the interest and/or the equity or maybe both because it will be very expensive. You folks know it, you've been

there before, so have I. So who's benefitting? You professionals will be taking home a lot of money, but your clients won't. Now, that's the bottom line.

MR. KRUGER: But, Your Honor, as I said, if it's necessary to have the estimation trial because of the solvency issue, we're prepared to go forward with that.

THE COURT: Well, I appreciate that fact. I hope your clients do to because by making this battle, I think you folks will be maybe taking home substantial bonuses, but I'm not so sure your clients are going to be benefitting.

MR. KRUGER: Your Honor, it's not our battle. The debtor and the Asbestos Committee have offered a plan. It's their battle.

THE COURT: Mr. Kruger, it's everybody's battle. The debtor has finite -

MR. KRUGER: But they haven't consulted us about it. They knew.

THE COURT: Mr. Kruger, the debtor has finite dollars. You folks can talk to each other. There is nothing that prohibits you, all of you, from talking to each other. You don't need to battle everything in the courtroom. You can talk to each other and see if you can't resolve these issues outside the litigation context.

MR. KRUGER: Your Honor, it's important to remember that any recovery by the bank debt holders of a full default

interest hurts the equity.

THE COURT: I understand that.

MR. KRUGER: It hurts no one else.

THE COURT: I understand that, and so the equity in the event that equity chooses to take something out of their billion two so that they can provide something more to the bank and the bank chooses maybe not to take the default rate but something more than the 6.09 so that you can get past this issue, it may be advisable to everybody because otherwise everybody's probably going to get hurt. That's what negotiation is all about. But, I'm not in a position to be able to do that. I've got a legal issue, and it's going to come down either yes or no. That's what happens with a legal issue, and if that means that you go back to litigation mode, that's what happens. You'll be going back to litigation mode, and everybody will not benefit from it. That's the reality. No one will benefit.

MR. KRUGER: Your Honor, there's always hope for a deal, Your Honor. Thank you. Thank you very much, Your Honor.

MR. BERNICK: If I could just - I understand where Your Honor's going. That's frankly where we have always been. That's why the plan reads out the way that it did. We didn't take it back off the table when they contested it. We left it on the table and they had to - I understand that Your

Honor is then facing a legal issue that, I think your message is, both sides could get hurt, and we fully appreciate that, and we'd be very anxious to be able to move forward, and beyond that I really can't say. I think that Mr. Bentley has talked about the equity folks. I know that these folks over here will have a different view. The debtors' viewpoint has been the same thing throughout, which is to get this deal put together, and if there's one thing that this case stands for, is the debtor has shown a track record of taking the pieces of the puzzle that are each one of them very, very difficult to fashion and through a variety of means, getting them put into place, and I think that that's true. You've seen it on PD. We've seen it with the cooperation of the FCR and the PI on the personal injury side. There are other parts that we think are going to come into place, but we can't have a situation, we can't put together the full puzzle when there's one piece that says, Well, we get it all, and if we don't get it all, we're just going to hold up the case for a long time. That's a very hard proposition for us to deal with, and we may have to deal with it, and God knows we've had to deal with problems before, we'll deal with it. I'm going to focus though -

MR. KRUGER: Your Honor, is this another sur-rebuttal? Are we going to go through this yet again?

THE COURT: No, but he's the moving party. He gets

the last word, so - Mr. Bernick, you've got exactly 10 minutes, and I'm counting.

MR. BERNICK: I'm going to take less, although my colleague Mr. Rosenberg also thought he was going to take less and couldn't manage it, but I understand that, I've been there myself. Just a couple of things. I really believe that it's too late in the day. Mr. Kruger made a very important announcement. He said the letter's gone. The letter is no longer, and presumably the reason that he said that is that we've been at pains to show that the fact that the letters are still there is the most tangible evidence of the fact that they don't really want to let go of it, they want to have their cake and eat it too, and that's not right. And that it's not just the last plan or the plan before it, it's this plan, and this plan, the fact of concurrence with this plan by the Committee is expressed in black and white by Ms. Krieger. She got the term sheet because remember, we made the public announcement but we then circulated the term sheet. So this was not just some out of nowhere. This was a very, very important statement, and at best, even if you adopt Mr. Kruger's interpretation, all that it says, it doesn't say anything about the Committee walking away or its counsel walking away. It just preserved an option for a holder, and we can deal with a holder. A holder doesn't change history. A holder can speak, no one can foreclose him

from speaking but they can't change history. This email confirmed the history. The history was further confirmed in all the briefing that took place today, and there actually is no more powerful evidence of the fact that the equities here in the case are in our favor. Because of that agreement, there is no more powerful fact than the very fact that Mr. Kruger had to take to his feet today and at the very last minutes of the last argument somehow make it all different by announcing that they're walking away from the letter. It's the most powerful evidence of how much in place these agreements have been. Two, second point, counsel make no bones about the fact, and Your Honor actually has said, Well, gee, aren't we just talking about the stuff, that is, the difference between the plan and what's involved in the plan, and the answer to that is, yes, if the plan still holds. And what we've said is that if the - our plan, we put it on the table. That was a given. We could have walked away from it, and said, Now you're contesting, we're going to take it off too. We left it on the table, and you say, well, if it's on the table and we're keeping it on the table, it has to be because you're keeping it on the table too. There's no point for us to litigate this issue where all we face is downside and all they face is upside. So that's why I differentiated between the first issue and the second issue. If that agreement is important, then it should be stayed in our plan,

it should stay before the Court, but then it really should be dispositive. If that agreement is not important, that it is not dispositive, and they're saying, Oh, well, we walk away from it. Then, well, why should it stay in the plan? Why shouldn't they face the downside of getting nothing? Why should they face the upside and not the downside? And yet, even in that context, they still can't walk away from the agreement. The agreement's still there. Even if he says, No, it's not, it's still there. It's been born into the history of what we're dealing with. So the difference between one is, one is our plan. Take it or leave it. Two says, Well if it's not the plan, then you don't get the letter, then you also face the downside of not getting any interest or getting less, and even then the plan's important - the agreement is important because it bears upon the equities of the situation. It's part of the history that can't - Mr. Kruger today can't wipe away that history. So that's the reason we distinguish those, but when you get to two, and this is the other thing, when you get to two, the history is relevant, but there are other relevant factors too. Those factors are not the contract. The equitable factors are not the contract. The equitable factors are the factors on the basis of which they may get what's in the contract, but the source of "they may get" is 1129(b). 1129(b) is not the contract, it's the equitable analysis.

Now, what did they have under issue two now to put into the equitable analysis? They just basically have just given up. They no longer say, really that there's a contribution. They no longer say that it's *de minimis*. They say nothing to say that they have done equity here, and in fact, you can make a strong argument to base upon the history of how they've acted here in the case. The equities actually cut against them, and that's why we say it's important to have the lower amount there. Last point is that they say that the equities are our problem. That is, the burden is on us to show something extraordinary to get back from what they're entitled. 502 says they're not entitled to anything. So the word "entitled" is wrong. It's all equitable, and the idea that somehow we bear the burden or a greater burden than they do under 1129(b) is just not how the cases work. At most you get - you know, Dow Corning which is the Sixth Circuit's decision that says there's a presumption, but there still has to be an analysis on both sides of the equation. If you take a look at all the equitable factors, not just the old contract, which is a legal factor, not an equitable factor, there's not one, not one equitable factor that cuts in their favor, and their conduct in the case cuts against them. Thank you.

THE COURT: All right. I am going to take this under advisement. This is not an issue that needs an

immediate adjudication. I am ordering you folks to talk and that is an order, and I want you to speak between now and the October 20th omnibus hearing to see whether or not you can come up with a consensual resolution of this before I have to make a ruling. So, I am not going to look at it between now and October 20th to see whether or not you can come up with a consensual resolution. Mr. Rosenberg, Mr. Kruger, I am ordering the Committee and the bank lenders to meet with the debtor and the Equity Committee to see whether or not some consensual resolution of this issue can be arrived at between - I'm ordering the debtor as a proponent of the plan to the extent that the Creditors Committee is a proponent, I don't really think any resolution will affect the Creditors Committee or frankly even the debtor at this point. I think it will affect equity, but nonetheless, as co-plan proponents, I think they need to be involved in the discussion. It's really, I believe, an issue that is going to affect the Equity Committee and the bank lenders and the Creditors Committee. I would like to see whether or not you can consensually resolve the interest issue. Mr. Kruger, I would also like to see whether or not the Creditors Committee can't somehow or other become a co-proponent of this plan, somehow, some way. That's why I want the Creditors Committee to be meeting with the debtor and the Asbestos Creditors Committee, particularly. So, I want all of you back to the

bargaining table, and I'm ordering you to do it between now and October 20th for the omnibus hearing, but particularly about the interest issue, whether or not you can become co-proponents of the plan. All right. I will not look at this until at least October 20 when you can give me a report about your meeting. Mr. O'Neill, anything else on the agenda for today?

MR. O'NEILL: Your Honor, we do have one continuance order I can hand up to your clerk.

THE COURT: All right.

MR. O'NEILL: And I don't know whether counsel wants the exhibits that were also submitted.

THE COURT: Oh, yes, I'm sorry.

MR. COBB: Your Honor, Richard Cobb on behalf of the bank lenders. Your Honor, this - I frankly it's a bit of a silly issue, but it does involve the evidence that the Court's going to consider in connection with this presentation. Your Honor had ruled some time ago that there would be no witnesses that could testify at the hearing on any topic, whether it be an evidentiary or it be fact-based or expert. So, Your Honor, the parties on both sides attached exhibits to the papers that were filed in support of their respective positions. It's the bank lenders and the Committee's position that those exhibits should become part of the record and that the Court should consider them as

evidence. Your Honor, late Friday, hearing nothing from the debtors with regard to anything with regard to exhibits being yes, it's their motion, I sent an email suggesting that we don't need to hand exhibit books up to burden Your Honor on another long trip back to Pittsburgh with heavy luggage, but we should simply tell the Court that that's the evidence that will be submitted in support of the parties' respective positions. Your Honor, at 7:30 last evening and then completing the circle at 11:30 last evening, I received objections from the debtors to our exhibits, and they run the gambit - I haven't heard what they are yet, but they run the gambit it appears directed towards expert testimony, perhaps to hearsay. Your Honor, it is simply - we think that it is a little ridiculous, frankly, Your Honor, to even have this discussion. Your Honor can give the evidence the weight that it believes is appropriate. They can consider the documents as part of the record. But the idea that we are now - I don't know, over the next hour or two, have some sort of discussion or argument over Daubert standards and what evidence constitutes hearsay when we can't bring a witness in, in order to provide the authenticity and take the hearsay rule out of play is just - it's silliness. That's our position, Your Honor. I'll allow the debtors to state where they stand on this at this point.

MR. BERNICK: That was a somewhat selective

recitation of what actually occurred, Your Honor. The pretrial order, we have a pretrial order that was an agreed order about how we were going to proceed today, it simply didn't make provisions for what folks were going to offer into evidence. So at some point last week, I don't know if it was Thursday, Friday, whatever, the issue got raised by the other side about, well, what do you intend to offer into evidence so that we can get this thing resolved. I said, Frankly, we'll see, but why don't you tell me - and they then said that they wanted to put everything that they had in all of their briefs into evidence. You know it was at that point that I said, No, that really is silliness. What do you really need for purposes of the case? There are all kinds of stuff in the briefs, and essentially between then and now they have refused to say which particular things they want to offer into evidence. Now, where I come from, offering something into evidence means some thing, and where they've made no bones about the fact that depending upon what happens, they may take an appeal, and they regard this as a trial, somebody says, Well, what comes into evidence? I say, Well, I'll take that just as it is. I say, Give me the lists. They won't even give me the lists. So last night I was sitting there with the cat over on one side and the dog on the other side in my apartment, and I went through on my own, and I typed out a little email because I figured out

from the briefs what all the different exhibits were, and I told them which ones I would object to if they offered it into evidence, and I set that up. I also said, Here are the ones that we're going to offer. I've received no response to that whatsoever except a statement that, well, they still want to kind of shovel everything in. And what I would suggest is as follows: I'm prepared to say now exactly what we're offering into evidence and which of their exhibits we object to, and what I would think is that between now and perhaps the omnibus, we can see if we can work this out, and if we can't work it out, then we will let the Court determine that along with everything else. We'll provide a list to the Court of what it is that's objected to and what is not objected to rather than trying to resolve those issue today, but I do -

THE COURT: Well, I think that makes sense, but in terms of a binder, frankly, if you're going to make an evidentiary submission, I would like it in a binder, pre-marked - I don't want it today. You can mail it to me. I'm not going to carry it home on a plan.

MR. BERNICK: Okay, that's fine.

THE COURT: You can send it to me in Pittsburgh rather than having it attached to a brief because if it's actually a trial submission, I don't know that anybody, if there is some appeal to this, will ever find it attached to a

brief. It really should be, I think, marked with however it's going to be used so that if you need to do something with it later you actually have it marked as an exhibit somewhere.

MR. BERNICK: Okay. So, that's fine. We'll go ahead and do - we'll see if we can reach agreement. If not - But, Your Honor, I will say that today we have said exactly what it is that we want to offer and exactly what it is that we're objecting to, and there are - reference has been made to Daubert, we're wanting - We're going to want to submit Mr. Ordway's deposition, which is short, but the guy admitted out of his own mouth that there was no standard or methodology that he used for anything. So, we don't mean to minimize these things. We tried to focus on the issues and focus on the exhibits, and we're still prepared to do that. So, I can go through it now but it sounds to me like it might be more productive to simply have a discussion with the other side, and if we can't reach agreement then we'll notify the Court which ones are at issue.

THE COURT: I think that would make more sense. To the extent that there's an authenticity issue -

MR. BERNICK: There's no authenticity issue.

THE COURT: All right, because if you need a witness for authenticity purposes, that's a different issue, but I had understood from the last conference months ago that the

documents were not really at issue, that that was not the - authenticity was not the issue.

MR. BERNICK: No, no, their exhibit list includes, for example, a transcript of a hearing before Your Honor. Cases - they have cases that are exhibits. They've got -

MR. ROSENBERG: I thought we were postponing this for another day.

MR. BERNICK: Well, but -

MR. ROSENBERG: Come on.

MR. BERNICK: In fairness, Mr. Cobb made a statement that basically said, We're engaging in silliness here, and it's exactly the opposite. I've tried many, many, many cases, all we're trying to do is focus on what they really need and to do us the courtesy of telling us what it is.

THE COURT: All right, well, reported cases are obviously not going to be an evidence matter, but I don't care if you attach copies -

MR. COBB: No question, Your Honor, and Your Honor, it's disappointing to have to even have this discussion with the Court at this stage. The email was sent late Friday, and it was addressed by Mr. Bernick on sometime Saturday. And there was never a suggestion. I pointed him right to our compendium of all of 23 exhibits, Your Honor -

THE COURT: Okay.

MR. COBB: - and then, you know, twelve hours

before the hearing we find out in summary fashion, in an email, Well, we have objections to these points. This is just not appropriate. We'll talk with debtors. We'll try to work this out, Your Honor, in good faith. We reserve all rights with respect to any of their exhibits that they apparently intend to submit in support of their arguments. Thank you, Your Honor.

THE COURT: All right, I really don't see why having done the argument that the exhibits are going to be - and having seen most of the exhibits attached to the briefs anyway, I'm not really sure what the nature of too many objections is going to be. If you've got a Daubert issue, okay, I mean, that's a legal argument that you can probably make with respect to experts, but other than that, the documents are the documents. I think to the extent that you've got an objection, raise it. In all probability what I'm going to do, I'll tell you now, is admit it. I've seen them anyway, and in all probability take whatever the objection is with respect to the weight of the exhibit. If there is some legal issue that I have missed in the context of looking at the exhibits then I certainly will consider that, but if it's an authenticity issue and you need a witness to authenticate the document, I will certainly permit the opportunity to authenticate a document that you think is appropriate. I just didn't understand that that was going to

be an issue and I'm not really sure why it will be, so - Okay. Submit them in binders, pre-marked for identification. If you've got any issues about them, you can let me know in some fashion that I'm sure you two can agree on, a letter submission, but make sure it's docketed, otherwise it will not be brought to my attention and we'll be fine, and if there are issues we'll address them at the next hearing.

ALL: Thank you, Your Honor.

THE COURT: Okay. Is that it?

MR. BERNICK: Yup.

THE COURT: All right, we're adjourned. Thank you.

(Whereupon at 1:54 p.m., the hearing in this matter was concluded for this date.)

I, Elaine M. Ryan, approved transcriber for the United States Courts, certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Elaine M. Ryan October 3, 2008

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